IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-3831

JOHN D. EHRLICHMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner seeks a Writ of Certiorari to the United States Court of Appeals for the District of Columbia from an Opinion and Order of that Court affirming the conviction of JOHN D. EHRLICHMAN.

OPINIONS AND ORDERS BELOW

The opinion and order of the United States Court of Appeals for the District of Columbia Circuit of 17 May 1976 is not officially reported and is attached as Appendix A. The judgment of that Court, entered the same day, is attached as Appendix B. The Order of August 16, 1976, denying the Petition for Rehearing and Suggestion for Rehearing *en banc* is attached as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 17, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented for review by way of the Petition for Writ of Certiorari are:

1. Did the United States Court of Appeals for the District of Columbia Circuit err by approving the exclusion of evidence which would tend to establish that the search and seizure of Dr. Louis J. Fielding's office was conducted for the purpose of gathering foreign intelligence information and matters affecting the national security and, as such, was not an unlawful search and seizure.

2. Did the United States Court of Appeals for the District of Columbia Circuit err when it found that a violation of the Civil Rights Act, 18 U.S.C. §241 could be established by proof of general intent instead of a specific intent.

3. Did the United States Court of Appeals for the District of Columbia Circuit err in finding that Petitioner, John D. Ehrlichman, was not deprived of his federal constitutional right to a fair and impartial jury trial when the trial court failed to dismiss, continue the case for trial, change venue or conduct a voir dire examination necessary to ferret out prejudiced jurors in the light of unprecedented prejudicial pre-trial publicity.

4. Did the United States Court of Appeals for the District of Columbia Circuit err by affirming the trial court's ruling depriving Petitioner, John D. Ehrlichman, of full and complete discovery pursuant to F.R. Cr. P. 16, the Jencks Act, and *Brady v. Maryland* with the benefit of his counsel to assist in the review of his White House papers.

5. Whether the United States Court of Appeals for the District of Columbia Circuit erred in failing to find that Petitioner John D. Ehrlichman's rights were violated when the trial court failed to sever Petitioner's trial from that of his co-defendants when presented with inconsistent and hostile defenses by his co-defendants and when the trial court failed to adhere to the *De Luna* Doctrine.

6. Whether the United States Court of Appeals for the District of Columbia Circuit erred when it failed to consider the question of whether or not Richard M. Nixon, then President of the United States, should have been required to appear at the trial to testify and when it failed to require the President of the United States to respond to written interrogatories propounded by Petitioner John D. Ehrlichman.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth, Fifth and Sixth Amendments, United States Constitution.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV, p. 361.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V, p. 4.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." U.S. Const., amend. VI, p. 4.

STATUTES INVOLVED

The statutes involved are 18 U.S.C.A. §241, 18 U.S.C.A §3500 and 42 U.S.C.A. §1983.

> "Conspiracy against rights of citizens
>
> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;
>
> * * *
>
> "They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life." 18 U.S.C.A. §241, p. 400.
>
> "Demands for production of statements and reports of witnesses" 18 U.S.C.A. §3500, 1975 P.P. p. 110 is attached hereto as Appendix D.
>
> "Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C.A. § 1983, p. 250.

RULES INVOLVED

The rules involved are Federal Rules of Criminal Procedure, Rule 14, Rule 16, Rule 17 and Rule 21(a).

"Relief from Prejudicial Joinder

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." F.R. Cr. P. 14, 18 U.S.C.A., Rules 10-17.1, p. 255.

"Discovery and Inspection" F.R. Cr. P. 16, 18 U.S.C.A., Rules 10-17.1, p.p. 355-356 is attached hereto as Appendix E.

"Subpoena" F.R. Cr. P. 17, 18 U.S.C.A., Rules 10-17.1, pp. 468-470 is attached hereto as Appendix F.

"Transfer from the District for Trial

"(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." F.R. Cr. P. 21(a), 18 U.S.C.A., Rules 18-31, p. 43.

STATEMENT OF THE CASE

On March 7, 1974, Petitioner, John D. Ehrlichman, was indicted and charged with violating the civil rights of Dr. Louis J. Fielding, making false statements to agents of the Federal Bureau of Investigation and three counts of perjury (R. 1).* Petitioner Ehrlichman entered a plea of not guilty on March 9, 1974 (R. 4, 5, 7).

On June 26, 1974, a jury trial was commenced. On July 12, 1974, the jury returned a verdict of guilty as to Counts I, II, III and IV and not guilty as to Count V of the indictment (R. 198). Thereafter, Petitioner Ehrlichman timely filed motions for a judgment of acquittal and for a new trial. With the exception of Count II, making of false statements to the F.B.I., these motions were denied (R. 213, 214, 215, 221, 222). The trial court en-

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*Page references preceded by "R" are to the original record in the Court of Appeals.

tered a judgment of acquittal as to Count II of the indictment. (R. 215(b)). Thereafter, Petitioner filed his Notice of Appeal to the United States Court of Appeals for the District of Columbia (R. 231). On May 17, 1976, the United States Court of Appeals for the District of Columbia entered its Opinion and Order affirming the conviction below. Thereafter, on June 1, 1976, Petitioner filed and served a timely Petition for Rehearing and Suggestion for Rehearing *en banc*. That Petition and Suggestion were denied by the United States Court of Appeals for the District of Columbia Circuit on the 16th day of August, 1976.

STATEMENT OF THE FACTS

Count I of the Indictment charged Petitioner Ehrlichman with conspiring to interfere with the civil rights of Dr. Louis J. Fielding by approving an unreasonable search and seizure of Dr. Fielding's offices in Beverly Hills, California, and, thereafter, concealing the same. The facts and circumstances which led to the alleged search and seizure in question, and alleged concealment thereof, are as follows:

In mid-June, 1971, the White House learned that one version of the 47 volume secret study of the Viet Nam War prepared by a group of experts and employees within the Department of Defense, commonly known as the "Pentagon Papers", had been delivered to the *New York Times* and other newspapers. (R. 48/1). In response to that theft, the President of the United States instructed Petitioner Ehrlichman to act as a liaison between the President and those in the Department of Justice, who were prosecuting lawsuits in an attempt to restrain the publication of these documents. (R. 206/1822).

During the week following the theft of the Pentagon Papers, Mr. Ehrlichman met with the President and Dr. Henry Kissinger, then the President's senior advisor on foreign affairs, to discuss the theft and its consequences. Dr. Kissinger advised the President and Mr. Ehrlichman that Daniel Ellsberg, the alleged perpetrator of the theft, was a fanatic, a drug user, and was privy to critical U.S. defense secrets of a current nature including, but not limited to, nuclear deterrent targeting. (R. 48/2). Dr. Kissinger gave both the President and Mr. Ehrlichman the impression that Ellsberg's responsibility for the theft of the Pentagon Papers presented a very serious national security problem. (R. 48/2). Dr. Kissinger told the President that the theft had made very difficult this nation's relations with those Allies with whom we shared classified information. During and as a result of those meetings, both the President and Dr. Kissinger were deeply concerned over the implications of the theft. (R. 48/2).

At the President's instructions and pursuant to a delegation of Presidential power in this matter, Mr. Ehrlichman told the Department of Justice to restrain the publication of the Papers and to conduct a vigorous investigation to uncover those guilty of the theft and compromise of the defense secrets. (R. 48/2). As the litigation to restrain publication of a part of the Pentagon Papers in the newspapers progressed (June 15-July 7), various "damage assessments" were prepared by national security exports. One such damage analysis was prepared by Admiral Guyler, Director of the National Security Agency, in Affidavit form describing how the Pentagon Papers theft had damged the Nation's security.[1] The President was informed of each of

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[1] This affidavit was filed with the Court; the Supreme Court has ordered it held under seal. (R. 206/2007).

these assessments. (R. 48/5). Thereafter, on July 6, 1971, the President and Mr. Ehrlichman met with the Attorney General. The latter advised that Dr. Ellsberg had Communist ties and was probably a part of a larger conspiracy. (R. 48/3).

At approximately the same time, the Assistant Attorney General for internal security called Mr. Ehrlichman to advise him that an "intercept" established that some or all of the Papers had been delivered to the Soviet Embassy in Washington. Mr. Ehrlichman in turn informed the President of this call. (R. 48/3). Mr. Ehrlichman also was made aware of F.B.I. reports which suggested that a group in Cambridge, Massachusetts had caused the Pentagon Papers to be duplicated and that a member of the conspiracy was an employee of the *New York Times.*

In the face of the urgency of the problem, then developing, the President began to question the ability of the F.B.I. to properly investigate this matter. Mr. Nixon indicated dissatisfaction with the F.B.I. Specifically, the Attorney General had advised Mr. Ehrlichman that F.B.I. Director, J. Edgar Hoover, had disciplined one of the F.B.I.'s top officials for ordering an interview of Ellsberg's father-in-law, Louis Marx. (R. 48/34). As a result of his concern about the apparent ineffectiveness of the Federal Bureau of Investigation, and his dissatisfaction with a diffusion of responsibility, the President instructed Petitioner Ehrlichman on July 2, 1971, to recruit someone to take full responsibility for the management of the Ellsberg matter and for the making of recommendations as to the prevention of further disclosures of classified information. (R. 48/4; R. 206/1822). During the week of July 7, 1971, the President decided that Egil Krogh, Jr. and David Young would have the responsibility for managing the project. (R. 206/1823; R. 202/957-958; R. 203/1266).

On Saturday, July 17, 1971, Petitioner Ehrlichman met with Krogh and Young and advised them of their assignment to manage this project, that the matter was considered by the President to be of the utmost importance, and that very serious national security issues were at stake. (R. 203/1266).

During the week of July 26, 1971, Howard Hunt[2] was assigned to assist Krogh and Young. (R. 201/742-3). Mr. Hunt testified that the Unit as part of its responsibility to prevent further unauthorized disclosures of classified information was engaged in a variety of enterprises, the principal one of which seemed to be the acquisition of all files and source material on Daniel Ellsberg because of generalized concern over Ellsberg's motive for violating the National Security Act when he released the documents to the newspapers and possibly to a foreign power. (R. 201/745-746).

Hunt suggested to other members of the Unit that in order to evaluate whether or not Dr. Ellsberg was acting alone or part of a conspiracy and in order to determine whether he would have the propensity to disclose further national defense information, the C.I.A. should be requested to prepare a psychological profile of Daniel Ellsberg (R. 202/943). As a result, on July 27, 1971, Young and Krogh advised Ehrlichman that they had instructed the C.I.A. to do a thorough psychological profile on Ellsberg. Government Ex. 5. Young and Hunt discussed the possibilities

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[2] At approximately the same time as the unit was formed, Charles Colson employed E. Howard Hunt as a Consultant to the White House. (R. 201/733). Mr. Hunt was introduced to Mr. Ehrlichman by Colson on July 6, 1971, in connection with a number of projects unrelated to this case. Mr. Hunt never met with Ehrlichman either before or since. (R. 201/734).

of a covert operation to examine the files being held by Ellsberg's psychiatrist, Dr. Fielding, to assist in this profile. (R. 202/960). Hunt recommended to Colson that the Special Investigation Unit obtain Ellsberg's files from his psychiatric analyst and also investigate or contact Ellsberg's I.S.A. and Rand colleagues. (R. 201/754).

Hunt, Liddy and Young discussed the manner in which they could obtain Ellsberg's files from Dr. Fielding. Dr. Fielding previously had declined to be interviewed by the F.B.I. Hunt therefore recommended that a "black bag job" (a surreptitious entry) be undertaken. (R. 201/757). The F.B.I. had formerly performed such entries, but those in the Unit were under the impression that the F.B.I. was no longer engaged in such activities. (R. 201/758). The C.I.A. was not requested to conduct such an entry because operations within the United States were usually regarded as beyond the scope of the agency's function.[3] (R. 201/759).

After preliminary discussion, the suggested "black bag job" was brought to Mr. Krogh's attention. (R. 201/760). Hunt advised Krogh and Young that a feasibility study was necessary to determine whether or not an entry could be effected. (R. 201/761; R. 203/1294). During these discussions, Krogh and Young insisted that no one directly or indirectly employed by the White House was to participate in the actual entry. (R. 201/761-2); (R. 203/1288-1292).

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[3] The unit was apparently unware of the fact that in 1971 the C.I.A. was actively engaged in this type of activity. See *United States v. Barker*, Case No. 74-1883 (decided by the Court of Appeals for the District of Columbia Circuit on May 17, 1976). Appendix G.

Young testified at trial that on or about August 5, 1971, he and Krogh raised with Ehrlichman a proposal for a covert operation to investigate Ellsberg. (R. 202/963). Young testified that Ehrlichman was told that Hunt had suggested examining Ellsberg's file as a way of getting a handle on the problem. Ehrlichman's response was "let's think about it." (R. 202/968).

On August 11, 1971, the C.I.A. concluded its first psychological assessment on Ellsberg's personality. (R. 202/973). Young reviewed that profile and determined that it was very superficial. As a result, he prepared Government Exhibit 12. That exhibit, dated August 11, 1971, recommended that:

> [A] covert operation be undertaken to examine all the medical files held by Ellsberg's psychoanalyst.

The exhibit reflects that Mr. Ehrlichman approved the recommendations and noting the following: "Provided that it is not traceable back to the White House." On August 25, 1971, Young sent a memorandum to Ehrlichman indicating that Hunt and Liddy had gone to California. (R. 202/995).

On August 27, 1971, Mr. Ehrlichman sent a memorandum written by Young and addressed to Colson in connection with the Ellsberg investigation entitled, "Subject, Hunt-Liddy Special Project Number One." That memorandum stated that "under the assumption the proposed undertaking by Hunt and Liddy would be carried out and would be successful, I would appreciate receiving from you by next Wednesday, a game plan on how and when you believe the material should be used." (R. 202/1000).

Upon Hunt's and Liddy's return from California, they met with Krogh and Young and advised them of the feasibility of the undertaking, and reviewed with them a detailed proposed method of conducting the surreptitious entry as well as a proposed budget for the operation. At the conclusion of the meeting, on August 30, 1971, Young testified that he and Krogh called Ehrlichman who was in New England on vacation. While Young recalled telling Ehrlichman that the investigators and Krogh felt the "operation" could be undertaken, (R. 202/1028-1030) Krogh testified that Ehrlichman was not told at the time that the Unit was going to enter Dr. Fielding's office. (R. 204/1367). Mr. Ehrlichman indicated that he had no recollection of such a telephone call. (R. 206/1954).

Thereafter, Hunt and Liddy travelled to Beverly Hills, California, and engaged in the surreptitious entry in question. It is uncontroverted from the record that Mr. Ehrlichman never contemplated any type of entry, much less the type of entry which was undertaken by the members of the entry team. (R. 206/2004-2006). In this regard, Krogh stated that the members of the entry team had gone beyond any instructions given to them with respect to where they should be operating. (R. 203/1308-9). Young testified that both he and Krogh were surprised at what had occurred. (R. 202/1032). When Krogh apprised Ehrlichman of what had occurred, Ehrlichman expressed great surprise and stated that their actions had been excessive. (R. 203/1310). Ehrlichman stated that Krogh telephoned him and advised that Hunt or Liddy or those working with them had gone into Dr. Fielding's office and had attempted to mask what they had done by making it appear as though a drug burglary had taken place. Krogh stated that Hunt and Liddy wished to conduct yet another search, of Fielding's apartment, but Krogh

thought they should not. Krogh was very chagrined and upset at the incident and was sorry that they had done it. Krogh testified that, at the time, he told Ehrlichman that he felt they had exercised very poor judgment. Krogh stated that he was remorseful in the process of recounting the incident to Ehrlichman. (R. 206/2014). Ehrlichman testified that he stated to Krogh that he disapproved and that he agreed with Krogh that no one should do anything more. (R. 206/2016). Ehrlichman stated that Krogh and Young and the others involved with the incident had exercised incredibly bad judgment and expressed his very great unhappiness and surprise at what had taken place. Ehrlichman stated:

> "It was just totally out in left field from anything I had contemplated." (R. 206/2016).

On cross-examination, Ehrlichman was asked whether or not he had contemplated such activities when he had approved a "covert operation" to investigate. Ehrlichman responded that "covert" to him meant a *private* investigation which did not contemplate that such a search would be undertaken. Ehrlichman believed that the records could have been examined simply by request; *i.e.*, by some third party going to a doctor and asking to see the records. He believed that the psychoanalyst who had Ellsberg's papers might be an employee of the Rand Corporation and that these investigators (Hunt and Liddy) could go directly to Rand to find out about Ellsberg. If the records were available, the Rand's management could be asked for them. (R. 206/2006). Ehrlichman did not know that the operation involved any illegal entry or search of Dr. Fielding's offices. (R. 206/2006). Ehrlichman assumed that since the unit was made up of two trained and experienced investigators, they would employ normal investigation techniques

in the same way as the F.B.I. and other governmental agencies did. (R. 206/2009).

Mr. Young had meetings with Mr. Ehrlichman in March, 1973, because he, Young, was going to resign. (R. 202/1048). Ehrlichman testified that he requested a meeting with Young because of a blackmail attempt by Hunt in connection with the Watergate Affair.[4] Young's secretary took a briefcase of files to Mr. Ehrlichman's office on or about March 26. (R. 202/1049). Mr. Ehrlichman stated at trial that the files had come over on or about March 22 at Young's suggestion, not at Ehrlichman's request and, when Ehrlichamn saw he could not review them because of his lack of time and an imminent departure to San Clemente, he sent them back to Young on March 23. (R. 207/2070). Young testified that he met with Ehrlichman on March 27. According to Young, Ehrlichman told him that he (Ehrlichman) had removed those memoranda from the file because they showed too much forethought with respect to the Ellsberg break-in. (R. 202/1052). Mr. Ehrlichman testified that he did not recall saying this to Young and that he had removed no memoranda from the file. (R. 207/2072). In fact, no documents were removed from the files. The only papers destroyed were those altered by David Young to protect himself. (R. 202/1037-8; see also, Gov't Ex. 22A, 22B, 22C). All the memoranda in

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[4] On or about March 22, 1973, Mr. Ehrlichman discussed with Young and Krogh the infamous Hunt blackmail threat. Hunt sent word that if he were not paid over $100,000 he would disclose "the seamy things" that he had done while he was in the employ of the White House. Ehrlichman feared that Hunt might be referring to a broad range of secret matters, beyond the Ellsberg matter, including other very sensitive, classified information known to those in the Unit. (R. 207/2064).

question were kept secure by Trudy Brown, the White House Custodian of Records. (R. 207/2072). Under the White House filing procedure someone marked the box "Ehrlichman" and placed files in it including a file folder marked "Leaks". The "missing" documents remained, at all times, in that folder. (R. 207/2075, 2108). Prior to and during trial Ehrlichman sought production of that file folder, but a subpoena issued for the same was quashed.

Krogh testified that, following the Hunt blackmail threat, he had a conversation with Mr. Ehrlichman at which time Krogh characterized the Fielding break-in as an "illegal frolic" in which the members of the Unit had gone far beyond their authority. (R. 203/1316-1317).

On or about March 22, 1973, (two days after the blackmail threat), Krogh received a telephone call from Ehrlichman during which Ehrlichman indicated that the President was aware of what had taken place in connection with the Fielding break-in and that the President considered that matter one of highest national security. Accordingly, Krogh was instructed that the President had directed him not to discuss it with anyone. (R. 203/1318). Krogh testified that Ehrlichman informed him, in late April, 1973, that the President felt very strongly that it was a matter of national security and that he had so informed Henry Peterson, then Assistant Attorney General of the United States. (R. 203/1319).

In May, 1973, Egil Krogh submitted an Affidavit to the Honorable Matthew Byrne, United States District Judge for the Central District of California, in connection with the prosecution of Ellsberg for the theft. Krogh acknowledged in that Affidavit that he bore personal responsibility for the operation in question. (R. 204/1333). In Krogh's letter of resignation to the President, as Under-

secretary of Transportation, Government Exhibit 26, paragraph 1, Krogh admitted that this mission was his responsibility, in excess of his instructions, and without the knowledge or permission of any superior. (R. 204/1333-1334).

William Treadwell, Krogh's attorney, testified at trial that he had learned from both Krogh and Young, separately, that Mr. Ehrlichman neither approved of the surreptitious entry into Dr. Fielding's office nor had prior knowledge of it. (R. 207/2129).

In Count II, Ehrlichman was charged with making false statements to agents of the F.B.I., on or about May 1, 1973, when, during an interview, he stated he had not seen anything on the Pentagon Papers investigation for over one year. This statement was true. There is no evidence to the contrary. Young sent papers to Ehrlichman's office in 1973, but there was no evidence that he looked at them.

Count III charged Mr. Ehrlichman with making a false statement before the Grand Jury when he stated that he did not recall hearing of the psychological profile until after the break-in into Dr. Louis J. Fielding's office. Admittedly, the testimony was factually incorrect. However, during the Grand Jury testimony the prosecutor did not show Ehrlichman the August 11 memorandum. Subsequent to his May Grand Jury testimony, which came on the heels of his resignation, (a very difficult time in his life), he spent extensive time conducting research in preparation for testimony before the Senate Select Committee on Presidential Campaign Activities as well as other Congressional committees. On June 12, 1973, a news story led him to search an impounded White House file. There, he saw Exhibit No. 13 for the first time in two years. He then knew the testimony he had given on the question of se-

quence was in error. As a result, Ehrlichman attempted to take such steps as were necessary to correct the record. (R. 206/1859). He and his attorney wrote letters to Senator McClellan, then Chairman of the Senate Committee on the C.I.A., to correct testimony given there as to the time of his knowledge of the profile. (R. 206/1860). Ehrlichman appeared before the Grand Jury again in September, 1973, at which time he attempted to clarify the record concerning this sequence of events.

The prosecutor knew of the August 11 memorandum (Exhibit No. 13) in May, but did not show it to Ehrlichman. When the Petitioner discovered it, he promptly set the record straight. Between the May and September Grand Jury appearances, Ehrlichman's five days of televised testimony before the Ervin Committee included a description of his knowledge of the profile *before* the break-in occurred; his research had, by then, led him to the memorandum. Thus, he publicly corrected the record as well.

At the conclusion of the trial, the jury returned a verdict of guilty as to Counts I, II, III and IV of the Indictment and not guilty as to Count V of the Indictment. Subsequently, the trial court entered a judgment of acquittal with respect to Count II of the Indictment.

REASONS FOR ALLOWING THE WRIT

1. The United States Court of Appeals for the District of Columbia Circuit erred by approving the exclusion of evidence which would tend to establish that the search and seizure of Dr. Louis J. Fielding's office was conducted for the purpose of gathering foreign intelligence information and matters affecting the national security and as such was not an unlawful search and seizure.

The question of searches and seizures in the context of national security and foreign intelligence information gathering represents an issue of grave and serious national importance. The standards applicable to such searches and the consequences of a violation of such standards must represent a potential restriction of significant magnitude to this nation's ability to protect its sovereignty. At stake is the delicate balance between individual liberty and this nation's ultimate ability to provide these freedoms.

The decision below requires such warrantless searches to be expressly approved by either the President or the Attorney General. Read in light of *Zweibon v. Mitchell*, ___ U.S.App.D.C. ___, 516 F.2d 594 (1975), such a search, even if so approved, must be limited to only those in collaboration with a foreign power. The dilemma so created by decisions in 1975[5] and 1976[6] require that federal agents discontinue their on-the-spot investigations to such bureaucratic transmissions of a request for Presidential Approval or perhaps the approval of the

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[5] *Zweibon v. Mitchell, supra.*

[6] *U.S. v. Ehrlichman,* Appendix A.

Attorney General at the risk of diverting their investigation with a concomitant adverse impact upon this nation's national security.

The significance of the problem is magnified by the agent's concern over potential criminal prosecution should an error in judgment occur. To this point, the Court of Appeals rejected both the requirement of specific intent and the defense of good faith and probable cause, as discussed below.

Here Petitioner had received a broad mandate of Presidential power which included authority to approve a covert operation of the type contemplated by Mr. Ehrlichman on August 11, 1971. The summary rejection of the propriety of this search represents a significant departure from the historical pattern followed until the decision by the Court of Appeals below. Because of the potential drastic impact which that opinion may have on national security, Petitioner respectfully submits this question should be reviewed by the Court.

2. The United States Court of Appeals for the District of Columbia Circuit erred when it found that a violation of the Civil Rights Act, 18 U.S.C. § 241 could be established by proof of general intent instead of a specific intent.

Specific intent is a critical and indispensable element of an offense under 18 U.S.C. §241. Yet, that element was virtually excluded as part of the offense by the Court below. The United States Court of Appeals for the District of Columbia in its Opinion rejected the concept of specific intent and held that under *Screws v. United States,* 325 U.S. 91, 65 S. Ct. 1031, 89 L.Ed. 1495 (1945), to prove a violation of 18 U.S.C. §241, a two-fold test must

be met; that the constitutional right be clearly delineated and plainly applicable under the circumstances of the case, a legal question; and that the defendant committed the act with a general "intent" of depriving the citizen victim of his federally protected rights, a jury question. App. A., p. 17. The court's analysis accepted the existence of probable cause as possible, refused to consider whether the national security exemption extended to physical intrusions as compared to electronic surveillance and found a violation of the Fourth Amendment because there was no specific authorization of the search by either the President or the Attorney General.

Even accepting the court's rejection of specific intent to violate constitutional rights, the first issue under the *Screws* test established by the court below must be whether in August, 1971, the national security exemption clearly required federal agents to obtain the prior approval of the President or the Attorney General. This requirement was not clearly delineated in 1971 and the failure to obtain such prior authorization could not result in a criminal conviction without rendering 18 U.S.C. §241 as being void for vagueness as applied. *United States v. Guest,* 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966). The court below incorrectly found that the first test of *Screws* was satisfied. In August 1971, only Justice White in his concurring opinion, in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) indicated that such prior authorization might be required. Justice Stewart indicated that the standard for warrantless searches in this area was an open question. *Giordano v. United States,* 394 U.S. 310, 314-315, 89 S.Ct. 1163, 22 L.Ed.2d 297 (1969). Justices Douglas and Brennan expressed disagreement with the exemption and therefore did not discuss the standards for its applica-

tion. *Katz v. United States, supra* at 359. Thus, in 1971 as today, no clearly defined procedures have been set forth guiding the scope of the national security exemption.

A further measure of the absence of a clear delineation of this question is the Richard Helms matter noted by the court below in *United States v. Barker,* Case No. 74-1883, decided May 17, 1976. See Appendix G. Director Helms relying upon his statutory responsibility to protect intelligence sources and methods from unauthorized disclosure, approved a surreptitious entry into a photographic studio in Fairfax City, Virginia. In the lower court's opinion in *Barker,* the court noted that in 1971, there could not be one Fourth Amendment for Richard Helms and another for Bernard Barker and Eugenio Martinez. Yet, the Fourth Amendment as applied to these government agents appears to be substantially different than that applicable to Petitioner in the instant case. The government has asserted that Petitioner operated under a Presidential mandate to stop the unauthorized disclosure of classified information, and thereby approved the surreptitious entry into Dr. Fielding's office. This contention is substantially similar to that rejected by the Department of Justice in the Helms matter and to that rejected by the court below in the *Barker* decision. Thus the certainty required by *Guest* could not be supported by the court's decision in *Barker* nor could it be supported by the Helms affair.

The court below found legal certainty and in turn sufficient intent based upon the belief that the exemption had been constantly conditioned upon the express approval by the President or the Attorney General. However, such references were neither constant, numerous or even clear in 1971 much less, today. Even in

United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974), the court referred to the powers of the Executive, thereby supporting the proposition that the President has the power to broadly delegate this national security search to others beyond the Attorney General as he had in this case to Mr. Ehrlichman. Moreover, the President's powers in this area are derived from his constitutional powers as Commander-in-Chief and his duty to conduct this nation's foreign affairs. As to the exercise of these powers, the Attorney General is not and has never been well equipped to serve as the Presidential delegate as have other members of the Executive Branch. The government, in its brief below, had recognized that cases referring to this exemption and the condition of approval by the President or Attorney General were not decided until 1973 or thereafter. See *Brief for the United States,* pp. 42-43. Even the apparent dispute between the Watergate Special Prosecutor's position that the national security exemption does not exist and that the Attorney General's position that the exemption required approval by either the President or the Attorney General in their briefs below further amplifies the lack of a clearly defined right in 1976 as required by *Guest,* much less 1971. Thus, the clear right which prevents the vagueness doctrine as announced in *Guest* from applying rests only upon Justice White's dicta in *Katz, supra,* Justice Stewart's refusal to consider the exemption in *Giordano,* the refusal of Congress to consider the issue in passing upon the Omnibus Crime Control and Safe Streets Act of 1968, and 18 U.S.C. §2510 et. seq. While in 1976 and in future years such special approval may be reasonable and serve a prophylactic effect against abuse by over delegation, it would be fundamentally inconsistent with *Guest* to define now the exemption and retroactively to apply it to Petitioner, John D. Ehrlichman.

The Court below further rejected the defense of good faith and reasonable reliance applying a different standard to Bernard Barker and Eugenio Martinez in *United States v. Barker, supra,* from that applied to Petitioner Ehrlichman. While rejecting the defense of good faith and probable cause as established by *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) in the instant case, the lower court fashioned that defense under the concept of good faith, and reasonable reliance upon a superior's apparent authority. However, the defenses are the same and should have been equally applied in both this case as well as *United States v. Barker, supra.* In *United States v. Barker,* the lower court held that while a mistake of law does not generally constitute a defense, where in a case of this nature, such a mistake is made, it constitutes a defense if objectively reasonable under the circumstances. Petitioner Ehrlichman was precluded from adducing evidence which would have established that his conduct was objectively reasonable under the circumstances. The trial court's Order precluding discovery unduly restricted Petitioner's ability to further develop the facts demonstrating the defense. *United States v. Ehrlichman,* 376 F.Supp. 39 (D.D.C. 1974). However, as was the case with Barker and Martinez, Petitioner Ehrlichman demonstrated facts sufficient to justify his reasonable belief that he had the authority to authorize the search into Dr. Fielding's office. Thus, the defense was equally available to Petitioner Ehrlichman since facts existed justifying his reasonable belief that he had the authority to authorize a search of Dr. Fielding's office and a legal theory on which to base a reasonable belief that such authority existed. See *United States v. Barker, supra,* at pp. 14-15.

Petitioner likewise satisfied the second element of the defense as fashioned by the Court of Appeals – the existence of a legal theory on which to base a reasonable belief that

he possessed authority to lawfully approve that which he was accused of, a warrantless search of Dr. Fielding's offices. This question turns on not whether such authority actually existed but to the reasonableness of such a belief in 1971. As noted by the court below in its opinion in *Barker, supra,* the President would always have such authority under the Constitution and that has always been the clear position of the Executive Branch. In 1971, regardless of the subsequent judicial clarification of the exemption, to the extent it exists, it was quite reasonable for Petitioner Ehrlichman to believe that searches of this nature were within the ambit of his authority, as was the case with former C.I.A. Director Helms. See, *United States v. Barker, supra* at 19-20. Since the reasonableness of the belief is the essence of the defense and sufficient facts existed to demonstrate the same, Petitioner Ehrlichman should have been permitted to present this defense to the jury.

3. The United States Court of Appeals for the District of Columbia Circuit erred in finding that Petitioner, John D. Ehrlichman, was not deprived of his federal constitutional right to a fair and impartial jury trial when the trial court failed to dismiss, continue the case for trial, change venue or conduct a voir dire examination necessary to ferret out prejudiced jurors in the light of unprecedented prejudicial pre-trial publicity.

The question of prejudicial pretrial publicity is a significant question of national importance since it arises in virtually every case of public interest being tried in the courts today. While there have been a number of pronouncements by this Court in terms of identifying the problem of prejudicial pretrial publicity there has not yet been

a clear standard provided by this Court which trial courts can adhere to in meeting their obligation to determine whether or not prejudicial pretrial publicity exists.

There is no question but that the pretrial publicity surrounding this case on the eve of trial was overwhelming. Petitioner Ehrlichman had been subjected to a "quasi trial" before the Senate Select Committee on Presidential Campaign Activities in which there had been a well-publicized denunciation of Mr. Ehrlichman as a liar by Senator Inouye of Hawaii. In the face of virtually daily coverage both in the newspapers as well as other public media, the jurors came to the trial virtually bombarded with an avalanche of overwhelming pretrial publicity.

Considering the nature of such publicity, the trial court failed to conduct any meaningful voir dire to determine whether or not there had been any deeply-held convictions against Petitioner Ehrlichman. By conducting limited questioning restricted to a juror's self-declaration of a predisposition towards guilt, the trial court ignored the fundamental principles of psychology recognized by the Courts of Appeal in *Delaney v. United States,* 199 F.2d 107 (1st Cir. 1952), and in *Silverthorne v. United States,* 400 F.2d 627 (9th Cir. 1968). Whether or not a self-protestation of fairness and neutrality made by a juror in the face of overwhelming pretrial publicity is sufficient unto itself to excuse the court from asking any further voir dire and to accepting the presumption that a fair and impartial jury exists is the issue. Petitioner respectfully submits that a decisive probing voir dire under such circumstances is the least required.

4. The United States Court of Appeals for the District of Columbia Circuit erred by affirming the trial court's ruling depriving Petitioner, John D. Ehrlichman, of full and complete discovery pursuant to F.R. Cr. P. 16, the Jencks Act, and *Brady v. Maryland* with the benefit of his counsel to assist in the review of his White House papers.

The government refused to produce Mr. Ehrlichman's White House records under Rule 16, F.R.Cr.P., or under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963). The government defended their own noncompliance by submitting an affidavit of J. Fred Buzhardt, then counsel to the President, to the effect that the documents were insignificant and not material. Petitioner Ehrlichman attempted to establish facts which would have controverted the *Brady* affidavit of the Government's designated agent, J. Fred Buzhardt. The trial court *summarily* refused to receive Petitioner's testimony or evidence on this question.[7] In this manner, Mr. Ehrlichman was deprived of the opportunity to factually establish the Government's willful non-compliance with the duty to produce relevant and material evidence.[8]

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[7] R. 149/Hearing on Satisfaction of *Brady* Requirements as to Defendant Ehrlichman. June 14, 1974.

[8] *See,* Joint Appendix, pp. 749-758; *see also,* R. 159/1, Ehrlichman's Motion for Issuance of a Subpoena Duces Tecum on the President of the United States for the Production of Certain of his Personal Papers which are in the Possession, Custody and Control of the President, and Memorandum in support thereof, Joint Appendix, pp. 236-245.

The materiality of this noncompliance is illustrated by the Government's failure to produce the "Leaks" file.[9] One of the essential facts in both the charge under 18 U.S.C. §241 and the charges under 18 U.S.C. §1623 stemmed from the testimony of David Young. Mr. Young testified at trial that Petitioner Ehrlichman had removed certain documents in March, 1973 from the file maintained on this subject because they reflected too much forethought. The Government suggested that the presence of those documents in a separately designated file – the "Leaks" file – amplified Mr. Young's testimony. Mr. Ehrlichman sought production of the actual file folder not to show *what* it was, but rather to indicate (1) that the documents and file folder existed (i.e., that they had not been destroyed), and (2) where in the White House the material could be found and (3) that the designation "Leaks" on the folder was not in Mr. Ehrlichman's handwriting and had been created by someone else, apparently subsequent to the physical taking of his record by the F.B.I. upon his resignation of office on May 1, 1973. The refusal to permit or require the production of this indispensable evidence not only left the Young-created impression with the jury that the records had been removed and destroyed, but also precluded Petitioner Ehrlichman from establishing that he had not participated, in any way, in the destruction or removal of documents. This critical evidence should have been produced by the Government in discovery.

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[9] Petitioner's proffer was, however, not limited to this one item; there were many other material errors in the Buzhardt Affidavit; *see* R. 149/Summary of Omitted Items Requested by Defendant Ehrlichman, Joint Appendix pp. 253-258.

The trial court further erred when it refused to allow Mr. Ehrlichman to have the benefit of counsel to assist him in the review of his papers which were in the possession of the White House. This Court has noted in *Alderman v. United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed. 176 (1969) that only defense counsel can appropriately appreciate the nuances involved in the strategy of a case. Mr. Buzhardt, a Government lawyer, was certainly no substitute for the Petitioner's counsel in the document review; nor could the fact that Mr. Ehrlichman is an attorney sufficiently excuse the exclusion of his counsel from the document review. An attorney charged with a criminal violation must be entitled to the effective assistance of counsel as a matter of basic due process. Essentially, the court below accepted the government's position on production without affording Mr. Ehrlichman an opportunity to be heard in opposition. Such a result is fundamentally inconsistent with due process of law and this issue should be considered in identifying an appropriate procedure for the court below to enforce, *Brady v. Maryland, supra,* Rule 16 and the Jencks Act.

5. The United States Court of Appeals for the District of Columbia Circuit erred in failing to find that Petitioner, John D. Ehrlichman's rights were violated when the trial court failed to sever Petitioner's trial from that of his co-defendants when presented with inconsistent and hostile defenses by his co-defendants and when the trial court failed to adhere to the *De Luna* Doctrine.

The court below erred when it failed, on several grounds, to sever John D. Ehrlichman from his co-defendants. On May 1, 1974, Petitioner Ehrlichman apprised the court, in his Motion for Severance (R. 59), that co-defendants Liddy,

Martinez and Barker would assert defenses inconsistent and hostile to his own. Ehrlichman argued that if they were tried jointly prejudice would result. Despite this contention, the trial court refused to sever. (R. 164/391-400).

When the inconsistent and hostile defenses were asserted at trial, the court refused to sever Ehrlichman from his co-defendants. As a result, Ehrlichman was forced to face prosecution from both the Government and from the contentions, argument and evidence adduced by his co-defendants.

During the trial, Liddy, Martinez and Barker asserted that they had acted under orders from a superior and that, therefore, their conduct was lawful. In his opening statement, Liddy's attorney, Mr. Maroulis, argued that Liddy had been acting upon the lawful order of his superior and directly referred to Ehrlichman as a superior. As a result, Mr. Maroulis contended that his client could not be a member of a criminal conspiracy. (R. 201/599-600). On several occasions, Liddy pointed to Ehrlichman as the superior who had approved this operation. (R. 201/598); (R. 209/2432B); (R. 209/2438). In this manner, Liddy argued to the jury that he was acting from the beginning under the authority and order of Ehrlichman and that, if any person was responsible for criminal misconduct, it could not be Liddy but rather Ehrlichman. As a result, Liddy became the second prosecutor in this case.

Liddy was joined by a third and fourth prosecutor in Barker and Martinez. These two defendants contended that they had been acting pursuant to what they believed to be an official request from the White House and, more specifically, from E. Howard Hunt. (R. 207/2209; R. 207/2170). Mr. Hunt testified that Messrs. Barker and Martinez had every reason to believe that the request they

received to participate in the operation was an official White House request. (R. 207/2158-2159). As a result, Barker and Martinez contended to the jury that they acted pursuant to the lawful orders of the superior and, consequently, could not be considered members of the criminal conspiracy. Since Ehrlichman was the only "superior" in this trial, it evolved that Ehrlichman faced prosecution not only from the Government but also his co-defendants at trial.

A second ground upon which the trial court erred in failing to sever Petitioner Ehrlichman was under the doctrine of *DeLuna v. United States,* 308 F.2d 140 (5th Cir. 1962). The *DeLuna* Court held that where one co-defendant, whose defenses are at odds with that of a second co-defendant, asserts his Fifth Amendment privilege against self-incrimination, counsel for the second co-defendant cannot make fair comment upon that fact and severance is in order. At trial, Liddy refused to testify. (R. 208/2288-2289). Ehrlichman, faced with inconsistent defenses asserted by defendant Liddy's attorney, sought to argue to the jury with respect to Liddy's failure to take the stand. Prior to final argument, the trial court instructed counsel for Petitioner Ehrlichman that the court would not permit any argument to be made as to defendant Liddy's failure to take the stand. (R. 208/2309-2310). As a result, Petitioner Ehrlichman was faced with the difficult prospect of allowing Liddy's defense to the effect that he was relying upon orders which originated from Ehrlichman to remain unchallenged and uncommented upon as to Liddy's motives for such a contention.

From the foregoing, it is apparent that the trial court erred in several ways with respect to severance. As a result, Petitioner Ehrlichman was deprived of a fair trail when the court refused to sever him despite the fact that co-defendants Liddy, Barker and Martinez asserted defenses incon-

sistent and hostile to his own and that Mr. Ehrlichman, when faced with the inconsistent defenses asserted by the attorney for Defendant Liddy, was prohibited by the court from arguing to the jury with respect to Mr. Liddy's failure to take the stand.

6. The United States Court of Appeals for the District of Columbia Circuit erred when it failed to consider the question of whether or not Richard M. Nixon, then President of the United States, should have been required to appear at the trial to testify and when it failed to require the President of the United States to respond to written interrogatories propounded by Petitioner, John D. Ehrlichman.

On the eve of trial, Petitioner Ehrlichman indicated to the court that he intended to call as a defense witness Richard M. Nixon, then the President of the United States. The trial court expressed its belief that it would be inappropriate to require the President to appear and testify at trial in an effort to avoid a constitutional conflict between the judiciary and the executive. Accordingly, the court instructed counsel to submit proposed written interrogatories.

Ehrlichman submitted proposed interrogatories. The first set of these interrogatories (R. 193) contained forty-eight specific questions concerning the President's instructions to form a Special Investigations Unit, the responsibility of persons assigned to that Unit, the information transmitted to the President by members of the Unit, together with Ehrlichman's general responsibilities. In addition, there were a number of questions which went to the issue of concealment as charged in the

indictment.[10] In this regard, certain interrogatories centered around the President's instructions not to disclose any of the activities of the Unit lest the disclosure of the same result in the revealing of certain highly classified and lawful activities of the Unit. (*See,* testimony of Young: R. 202/1065; and of Krogh: R. 203/1318-1319). Additionally, there were a number of interrogatories propounded which would have established that Ehrlichman did not entertain the requisite specific intent to violate the Constitutional rights of Dr. Louis J. Fielding.

The trial court declined to accept those interrogatories and, instead, required Ehrlichman to submit amended interrogatories. In the second set of interrogatories (R. 194), Ehrlichman requested that the President disclose the nature and circumstances surrounding the formation of the Unit, instructions given to members of that Unit, information received by members of that Unit and restrictions on any discussions or testimony about the activity of the Unit. Other interrogatories asked the President to disclose whether or not he instructed the Unit to investigate the affairs of Ellsberg and, if so, the nature of his instructions. The interrogatories also went to the issues of specific intent and concealment. As in the case of the original interrogatories, the trial court refused to submit them to

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[10] The indictment charged that the conspiracy in question was aimed not only to violate Dr. Fielding's rights, but further to conceal that violation. In connection with the same, it was material to the defense to establish that the concealment of the activities of the Special Investigations Unit was by direct order of the President of the United States, based upon the President's judgment that the disclosure of such activities might reveal certain highly classified information.

the President. Consequently, Mr. Ehrlichman, reserving all his rights, submitted four interrogatories (R. 195). These stated:

> 1. Please state the circumstances surrounding the formation of the Special Investigating Unit of the White House.
>
> 2. What instructions, if any, did you give to John Dr. Ehrlichman, Egil Krogh, Jr., or David R. Young as to the activities of this Unit?
>
> 3. Please state the circumstances surrounding each instruction given by you instructing any person not to discuss the activities of the Special Investigating Unit by reason of national security or Executive Privilege.
>
> 4. Please state why each person stated in your answer to the preceding interrogatory was advised not to discuss the activities of the Special Investigating Unit by reason of national security or Executive Privilege.

The trial court thereafter prepared its own interrogatories and, on July 9, 1974, requested the President to answer the same. The interrogatories were voluntarily answered and received into evidence as the Court's Exhibits 1 and 2. These exhibits contain general conclusions which reflect that the President had caused the Unit to be formed and that he had given general instructions that the activities of the Unit should not be disclosed. In addition, the President stated that he did not authorize the search and seizure of the office of Louis J. Fielding.

The limited nature of the interrogatories which the court ultimately propounded, and the President's answers

thereto, did not endeavor to treat the issue of specific intent. They dealt, instead, with the President's knowledge of the facts in a most general and non-specific way. Consequently, the probative value of such interrogatories was significantly diminished. Thus, Petitioner Ehrlichman was deprived of meaningful testimony of an exculpatory nature as to both the issues of specific intent and concealment, insofar as specific orders requiring the non-disclosure of the Unit's activities.

The trial court erred both when it failed to require Mr. Nixon to testify at trial and when it failed to permit Ehrlichman to propound detailed interrogatories to the President which would have elicited exculpatory testimony. As early as 1807, Chief Justice Marshall recognized that a subpoena may be directed to the President where his testimony is relevant to a criminal proceeding. *United States v. Burr,* 25 Fed. Cas. 30 (Case No. 14, 692). The separate question of a President's obligation to respond to a subpoena in a criminal proceeding remained untreated, however, until the Court of Appeals for the District of Columbia Circuit addressed that question in *Nixon v. Sirica,* 159 U.S.App.D.C. 58, 487 F.2d 700 (1973).

In *Nixon v. Sirica, supra,* the Watergate Special Prosecutor caused to be issued on July 23, 1973, a subpoena duces tecum upon President Nixon, pursuant to F.R.Cr.P. 17. On July 25, 1973, the President informed Chief Judge John J. Sirica that he considered it inconsistent with the public interest and the constitutional position of the Presidency to comply with this subpoena. Thereafter, the court ordered the President to show cause why the documents should not be produced. Mr. Nixon responded by asserting both executive privilege and the contention that the court lacked the jurisdiction to enter an enforceable order compelling the

compliance with a subpoena. The trial court rejected that contention and, on August 29, 1973, required the President to comply with the subpoena by the production of the items requested for an *in camera* inspection. 360 F.Supp. 1 (1973). The Court of Appeals affirmed Judge Sirica's opinion, noting the ample legal and historical precedent for the proposition that courts have the power to enter mandatory orders to compel members of the Executive Branch to produce certain evidence, subject to executive privilege where applicable.[11]

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[11] The court first pointed out that, in the past, courts have assumed that they have the power to enter mandatory orders to officials of the Executive Branch to compel production of evidence, *citing* United States ex rel. *Touhy v. Ragen,* 340 U.S. 462, 465-466, 472, 71 S.Ct. 416, 95 L.Ed. 417 (1951) (Frankfurter, J. concurring); *Westinghouse Electric Corp. v. City of Burlington, Vt.,* 122 U.S. App. D.C. 65, 351 F.2d 762 (1965); *Boeing Airplane Co. v. Coggeshall,* 108 U.S. App. D.C. 106, 280 F.2d 654 (1960). This Court then went on to state that:

> The Court's assumption of legal power to compel production of evidence within the possession of the Executive surely stands on firm footing. *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), in which an injunction running against the Secretary of Commerce was affirmed, is only the most celebrated instance of the issuance of compulsory process against Executive officials. *See, e.g.,* United States v. United States District Court, [supra], (affirming an order requiring the Government to make full disclosure of illegally wiretapped conversations). Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 9 L.Ed. 1191 (1828) (issuing a mandamus to Postmaster General, commanding him fully to comply with an act of Congress); State Highway Comm. v. Volpe, 479 F.2d 1099 (8th Cir. 1973) (enjoining the Secretary of Transportation).
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> (continued)

In *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), which dealt with a different Grand Jury subpoena (seeking the production of several additional tapes), this Court effectively affirmed the court's decision in *Nixon v. Sirica* and stated that:

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11 (continued)

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Only last term in Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court stated that a District Court 'may order' *in camera* inspections of certain materials to determine whether they must be disclosed to the public pursuant to the Freedom of Information Act. 487 F.2d, at 708-709.

Finally, the Court addressed itself to the historical precedent which supports the proposition that the President can, under appropriate circumstances, be required to comply with a subpoena. In *United States v. Burr, supra*, Chief Justice Marshall clearly indicated that while the President's special interests may warrant a careful screening of subpoenas after the President-interposes an objection, some subpoenas will nevertheless be properly sustained by judicial orders of compliance. As this Court noted, Marshall's opinion in the Burr case 'should put to rest any argument that [Marshall] felt the President absolutely immune from orders of compliance.' 487 F.2d at 710. Eleven years after the Burr case, a subpoena was issued to President James Monroe summoning him to appear as a defense witness in the court martial of Dr. William Burton. At the time, Attorney General Wirt advised President Monroe, through the Secretary of State, John Quincy Adams, that a subpoena could 'properly be awarded to the President of the United States'. Wirt suggested, however, that the President shouold indicate, on the return, that his o his official duties precluded a personal appearance at the court martial. William Wirt to John Quincy Adams, Jan. 13, 1919, Records of the Office of the Judge Advocate General (Navy), Record Group 125, (Records of General Court Martial and Courts of Inquiry,

(continued)

"[T]his presumptive privilege [of presidential communications] must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. *To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.*" (Emphasis supplied).

From the foregoing, it can be concluded that Petitioner Ehrlichman had an absolute right to require Mr. Nixon to

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11 (continued)

Microcopy M-272, Case 282). In conformance with this advice, President Monroe wrote upon the back of the summons that he would be ready and willing to communicate, in the form of a deposition, any information which he might possess relating to the subject matter in question. President Monroe did, in fact, respond to written interrogatories. As such, the issue of whether or not the the President would be required to appear and testify was not squarely raised.

appear and testify at trial as a "fact witness" with respect to that relevant information which he possessed and the constitutional dilemma which the trial court believed existed should have been resolved in favor of Mr. Nixon's attendance. The court below erred when it did not require Mr. Nixon to so appear. A President is not immune from the laws of this country including the duty to testify in judicial proceedings as a proper fact witness. In limiting Petitioner Erhlichman to the use of interrogatories, and in restricting the use of those interrogatories to the point where Petitioner Ehrlichman was deprived of much exculpatory testimony, the ends of justice were not met and the trial court erred.

CONCLUSION

It is patently clear that the decision by the United States Court of Appeals for the District of Columbia Circuit in effect creates as many questions as it attempts to resolve involving the right to engage in warrantless searches and seizures for the purpose of foreign intelligence information gathering, the constitutionality of 18 U.S.C. §241, the question of intent under that statute together with a failure to fully and properly consider the remaining issues discussed above. In every way possible, both the trial court and the United States Court of Appeals for the District of Columbia Circuit have effectively shrouded the issues by attempting to see that a conviction was rendered and ultimately affirmed. Commencing with the first stage of the case when the defense of national security was announced to the Court, it was rejected. The defense of specific intent was rejected. Discovery was precluded. A fair trial was not obtained. The Petitioner was deprived of his opportunity to obtain defense witnesses. In essence each and every aspect of the defense and its ability to prepare and try its

case was rejected by the Court of Appeals. In the face of the same, there is only one thing that clearly stands out, where there was an opportunity to deprive Petitioner Ehrlichman of his federally protected constitutional rights, that opportunity was fulfilled through a denial.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia was mailed this ____ day of September, 1976 to Charles Ruff, Esquire, Watergate Special Prosecutor, U.S. Department of Justice, 315 9th Street, N.W., Washington, D.C. 20530.

By: _____
WM. SNOW FRATES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-383

JOHN D. EHRLICHMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1882

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN, APPELLANT

Argued 18 June 1975

Decided 17 May 1976

John D. Ehrlichman was convicted by a jury of the United States District Court for the District of Columbia on one count of conspiracy to violate the civil rights of Dr. Louis Fielding, 18 U.S.C. § 241, and on two counts of perjury. 18 U.S.C. § 1623. The indictment and conviction arose out of the burglary of Dr. Fielding's office by members of the "Special Investigations" unit within the White House, over which Ehrlichman exercised general supervision, and out of statements made by Ehrlichman to the grand jury and the FBI, in the aftermath of the break-in. The conviction was appealed to the United States Court of Appeals for the District of Colum-

bia, where argument was heard by a panel of Judges Leventhal, Wilkey and Merhige, the latter sitting by designation from the Eastern District of Virginia. The opinion of the court by Judge Wilkey affirms the conviction on all counts.

With regard to the conviction under 18 U.S.C. § 241 of conspiracy to violate the civil rights of Dr. Fielding, Ehrlichman raises two substantive challenges. He argues: First, that the search was legal because undertaken pursuant to a delegable Presidential power to authorize such a search in the field of foreign affairs, and; Second, that even if the search was illegal under the Fourth Amendment, Ehrlichman acted with a good faith belief in its legality, and therefore lacked the specific intent to interfere with Dr. Fielding's constitutional rights which is required for a conviction under section 241.

Dealing with the two arguments together, the court first concludes that the specific intent needed for a conviction under section 241 does not require recognition by the defendant of the unlawfulness of his acts, but only an intent to commit actions which in fact deprive a citizen of constitutional rights which are firmly established and plainly applicable. (Op. at 13-21). The court upholds the trial judge's ruling that the intrusion infringed Dr. Fielding's firmly established Fourth Amendment right, because the legal theory advanced to justify the warrantless search is clearly inapplicable. Defendant's claim of a national security exemption to the Fourth Amendment warrant requirement is negated by the lack of any assertion of actual authorization by either the President or the Attorney General. (Op. at 21-31). The court's opinion does not reach the alternative ground of the trial judge's ruling, that the national security exemption can never be used to justify a warrantless physical intrusion. The court finds proper the trial

judge's instructions as to the other elements of the offense. (Op. at 31-33).

Ehrlichman does not challenge his conviction on the two perjury counts on grounds of the facts and law pertaining to them, but does raise several objections applicable to all three counts, relating to the fairness of the trial and to certain procedural rulings by the trial judge. The court holds that the jury selection process was adequately safeguarded against the taint of pretrial publicity. (Op. at 7). It holds further that the denial of Ehrlichman's motion for severance of his trial from those of Barker, Martinez, and Liddy was not an abuse of discretion, because no irreconcilable inconsistency of defenses has been shown. (Op. at 33-36). Finally, the court rules that Ehrlichman was not denied discovery rights under Rule 16 of the Federal Rules of Criminal Procedure and the Sixth Amendment, but rather was given ample opportunity to examine and produce allegedly exculpatory White House documents, and to have the benefit of information available only from the President through interrogatories drafted by the trial court. (Op. at 36-43).

The conviction on all counts is accordingly AFFIRMED.

Judge Leventhal files a concurring statement, joined by Judge Merhige, taking issue with the claim, in the amicus memorandum of the Attorney General, that a warrantless physical intrusion may be justified by the authorization of the President or Attorney General even in the absence of exigent circumstances.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1882

UNITED STATES OF AMERICA

v.

JOHN D. EHRLICHMAN, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(D.C. Criminal 74-116)

Argued 18 June 1975

Decided 17 May 1976

William Snow Frates and *Andrew C. Hall* for appellant in No. 74-1882.

Philip B. Heyman, Special Assistant to the Special Prosecutor, with whom *Henry S. Ruth, Jr.*, Special Prosecutor, *Peter M. Kreindler*, Counsel to the Special Prosecutor, *Maureen E. Gevlin* and *Richard D. Weinberg*, Assistant Special Prosecutor, were on the brief for appellee. *Leon Jaworski*, Special Prosecutor, at the time the record was filed, entered an appearance as Special Prosecutor.

Ivan Michael Schaeffer, Attorney, Department of Justice, filed a memorandum on behalf of the United States of America as *amicus curiae*.

Before: LEVENTHAL and WILKEY, *Circuit Judges* and MERHIGE,* *United States District Judge* for the Eastern District of Virginia

Opinion for the Court filed by *Circuit Judge* WILKEY.

Concurring opinion filed by *Circuit Judge* LEVENTHAL, joined by *Judge* MERHIGE.

WILKEY, *Circuit Judge*: On 7 March 1974 the appellant, John D. Ehrlichman, was indicted and charged with conspiracy in violation of the civil rights of Dr. Louis J. Fielding (Count I),[1] making a false statement to agents of the Federal Bureau of Investigation (Count II),[2] and three counts of perjury (Counts III-V).[3] Also indicted, on the conspiracy charge alone, were G. Gordon Liddy, Bernard Barker, and Eugenio Martinez.[4] The trial commenced on 26 June 1974; on 12 July the jury returned a verdict of guilty as to Counts I-IV and not guilty as to Count V. Subsequently, the trial court entered a judgment of acquittal with respect to Count II. This appeal, therefore, is addressed to Ehrlichman's conviction on Counts I, III, and IV, conspiracy and perjury.

I. FACTUAL BACKGROUND AND ISSUES

The publication of the "Pentagon Papers" [5] in the summer of 1971 spurred the President to form a "Special Investigations" or "Room 16" unit within the White House, whose purpose was to investigate the theft of the Pentagon Papers and prevent other such security leaks. Defendant Ehrlichman, who was the Assistant to the

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

[1] 18 U.S.C. § 241.

[2] 18 U.S.C. § 1001.

[3] 18 U.S.C. § 1623.

[4] The appeals of these co-defendants are treated in separate companion opinions, also handed down today.

[5] *See New York Times Co.* v. *United States*, 403 U.S. 713 (1971).

President for Domestic Affairs, exercised general supervision over the unit; Egil Krogh and David Young were charged with its operation. At the time, Krogh was an assistant to Ehrlichman; Young worked with the National Security Council. They sought, and received, Ehrlichman's approval to add G. Gordon Liddy, a former F.B.I. agent, and E. Howard Hunt, a former C.I.A. agent, to the unit.

Appellant's brief describes the activity of the unit, insofar as pertinent, as follows (Br. 6-8): The unit's principal enterprise seemed to be the acquisition of all files and source material on Daniel Ellsberg. There was a generalized concern over his motives for releasing classified materials (the Pentagon Papers). Young and Krogh instructed the CIA to do a psychological profile on Ellsberg. Since Dr. Fielding had refused an interview by the FBI on the ground of doctor/patient confidentiality, Hunt suggested examining Dr. Fielding's file on Ellsberg, and further suggested a "black bag job" (surreptitious entry) while noting that the FBI no longer engaged in such activities. When Young reviewed the psychological assessment on Ellsberg prepared by the CIA, he determined that it was superficial, and recommended that a "covert operation be undertaken to examine all the medical files held by Ellsberg's psychoanalyst." The exhibit reflects Ehrlichman's approval of the recommendation with his addition: "Provided that it is not traceable back to the White House." *

* The Government brief notes that the reasons for interest in Ellsberg's psychiatric records "were, at best, mixed" (p. 10). It refers (pp. 16-17) to Young's memorandum to Ehrlichman of 26 August (G. Ex. 17) as clearly indicating that the fruits of the entry were not to be used simply to determine Ellsberg's mental state. That memorandum proposes a meeting "to determine an overall game plan," which would address issues including "(9) How quickly do we want to try to bring about a change in Ellsberg's image?" A footnote adds: "In connection with issue (9), it is important to point out that with the recent article on Ellsberg's lawyer, Boudin, we have already started on a negative press image for Ellsberg. If the present Hunt/Liddy Project is successful, it will be absolutely essential to have an overall game plan developed for its use in conjunction with the Congressional investigation." On 27 August Ehrlichman sent a memorandum to Charles Colson stating: "On the assumption that the proposed undertaking by Hunt and Liddy would be carried out, and would be successful, I would appreciate receiving from you by next Wednesday a game plan as to how and when you believe the material should be used." (G. Ex. 18.) At the trial Young testified that part of the purpose in examining Fielding's files was to obtain information that could be made public through Congressional investigations, hearings or by release to the newspapers (Tr. 1179). The "Boudin materials," item (4) on Young's list, was an article prepared by Hunt containing derogatory information on Ellsberg's attorney, Leonard Boudin, which Ehrlichman forwarded on 24 August to Colson, who in turn leaked it to a reporter for the Detroit News. (Tr. 988, 1934; G. Ex. 15, 27.)

The members of the unit were clear that the "covert operation" in question would be a surreptitious entry into Dr. Fielding's office. Ehrlichman's primary defense at trial, however, was that he was not apprised of, and thus did not authorize, such an entry. He testified that he thought he had approved only a conventional private investigation, involving no surreptitious search of Dr. Fielding's office. Considerable evidence was introduced on both sides of the question. The jury's guilty verdict on the conspiracy Count I reflected a finding that Ehrlichman had in fact authorized the search.

Krogh and Young insisted that no one employed by the White House was to effect the actual entry into Fielding's office. Hunt traveled to Miami in mid-August 1971 to enlist the assistance of Bernard Barker, who had worked under Hunt during the Bay of Pigs operation. Hunt was widely known and respected in Miami's Cuban-American community as a government agent who had been a leader

in the fight to liberate Cuba. He did not identify the object of the search, but told Barker only that the operation involved a traitor who had been passing information to the Soviet Embassy. On the basis of this information Barker recruited two men, Eugenio Martinez and Felipe de Diego, for the operation.

Hunt and Liddy met Barker, Martinez, and de Diego in Los Angeles on 2 September 1971. The Miamians were informed their mission was to enter Dr. Fielding's office, that Dr. Fielding was not himself the subject of the investigation, but that they were to photograph the file of one of his patients (they were not told Ellsberg's name until minutes before the break-in) and return the file to its place. On 3 September Barker and de Diego, dressed as deliverymen, delivered a valise containing photographic equipment to Dr. Fielding's office, enabling them at the same time to unlock the door to facilitate subsequent entry. Later that evening they and Martinez, contrary to expectations, found both the building and Dr. Fielding's office locked. The Miamians forced their way into the building, broke the lock on the office door, and used a crowbar on Dr. Fielding's file cabinets. As instructed if this became necessary, they spilled pills and materials about the office to make it appear that the break-in was the work of a drug addict. Throughout the operation surgical gloves were used to avoid fingerprint detection. In spite of all efforts, Ellsberg's records eluded them.

After relating the details of the entry and their lack of success to Hunt, Barker, Martinez, and de Diego returned to Miami. Hunt and Liddy returned to Washington, where they reported the failure of the operation to Krogh and Young. Krogh relayed that information to Ehrlichman.[7]

[7] When Krogh and Young received the full report on the break-in, including pictures that had been taken showing some damage to Dr. Fielding's office, they testified they were surprised and distressed. They had expected an operation which would leave no sign of the entry and search. When Krogh described what had happened to Ehrlichman, he also expressed surprise and stated that their actions had been excessive. He stated at trial, "It was just totally out in left field from anything I had contemplated." Tr. 2016. *See* note 62 *infra*.

White House involvement in the break-in remained unknown for almost two years. When the facts about the operation began to surface, however, on 14 March 1973 Ehrlichman was called before the grand jury to testify about his knowledge of the affair. He stated that he had not been aware prior to the break-in that the Room 16 unit was looking for information with which to compose a psychological profile of Ellsberg, and had had no advance knowledge that an effort was to be made to get such information from Dr. Fielding. One year later he was indicted, subsequently tried and convicted, for his role in authorizing the break-in and for his efforts to conceal his involvement by lying to the grand jury.

Ehrlichman raises on appeal two substantive challenges to his conviction under 18 U.S.C. § 241 of conspiracy to violate the Fourth Amendment rights of Dr. Fielding. The first is that the break-in, although conducted without a judicial warrant, did not violate the Fourth Amendment, because it was undertaken pursuant to the President's delegable constitutional prerogative in the field of foreign affairs to authorize such a search. The second argument is that even if the search was unjustified in either law or fact and thus illegal, the Special Prosecutor failed to meet his burden under section 241 of proving Ehrlichman acted with a "specific intent" to interfere with Dr. Fielding's constitutional rights. As we interpret the case law surrounding section 241, the first issue—that of the applicability under these circumstances of the "foreign af-

fairs" exemption to the warrant requirement—is bound up in the second. They will be discussed together in Part II below.

Ehrlichman does not challenge his conviction of two counts of perjury on substantive grounds relating particularly to those counts or to the law of perjury. He does, however, attack his conviction as a whole—both for conspiracy and for perjury—on a number of grounds relating to the fairness of the trial and certain of the District Court's procedural rulings. His principal argument is that he was denied a fair trial, in the light of prejudicial pre-trial publicity, when the court failed to dismiss the indictment, continue or change the venue of the trial, or conduct a voir dire adequate to eliminate possibly prejudiced jurors. Our close examination of the procedures followed by the trial judge has satisfied us that he properly made the determinations required of him under the controlling decisions of this court.[8]

Subsidiary arguments advanced by Ehrlichman against the conduct of the trial are levelled at the District Court's decision not to sever Ehrlichman's prosecution from that of his co-defendants, the court's refusal to order certain discovery Ehrlichman claimed was important to his defense, and the court's failure to require then President Nixon to testify or to respond to detailed inter-

[8] As to change of venue, "[t]he ultimate question . . . is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination. It is then, and more usually only then, that a fully adequate appraisal of the claim can be made, and it is then that it may be found that, despite earlier prognostications, removal of the trial is unnecessary." *Jones* v. *Gasch*, 131 U.S.App.D.C. 254, 261, 404 F.2d 1231, 1238-39 (1967) (footnotes and citations omitted), *cert. denied*, 390 U.S. 1029 (1968).

A pattern of bitter prejudice throughout the community can render the voir dire an unsatisfactory device for selection

of an impartial jury. *See, e.g., Irvin* v. *Dowd*, 366 U.S. 717, 727 (1961), discussed in *United States* v. *Liddy*, 166 U.S. App.D.C. 95, 101, 509 F.2d 428, 435-36 (1974) *cert. denied* 420 U.S. 911 (1975). Under our ruling in *Jones* v. *Gasch*, we look to the results of the voir dire for indication of any "pattern of deep and bitter prejudice" that would bring into question the veracity and reliability of the jurors' representations of impartiality. An examination of the voir dire process and its results in this case makes clear that the extreme circumstances condemned by the Supreme Court in *Irvin* and in *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), and *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), are not present here. After some general questions the trial judge eliminated some veniremen and examined the remaining prospective jurors individually to elicit any knowledge each might have about the case. Counsel were invited to propose additional questions, and all but Ehrlichman's counsel took advantage of that opportunity. The trial judge asked questions to determine where the juror, as a result of news coverage, had any notion of who the parties were and what Watergate in general or the Fielding incident in particular was about. If the juror seemed to have any knowledge of the case, the trial judge then explored the type and source of information the juror had heard and remembered. The voir dire revealed that the array as a group neither was generally aware of the facts of the break-in nor had formed opinions about the defendants. A panel of approximately 120 veniremen was questioned about publicity; all thirteen who indicated they had an unfavorable opinion about the defendants were excused.

As to the jurors and alternates selected to serve none had expressed an opinion about the defendants' guilt, although one had heard that there had been a break-in by someone and another had heard that Ehrlichman was "involved" (Tr. 394-97). Few of the jurors selected had more than a faint awareness of the Fielding-Ellsberg matter, and none expressed any particular interest in Watergate. None were challenged for cause by the defendants.

The law does not require that jurors be totally ignorant of the facts and issues involved in a case. See *Irvin*, 366 U.S. at 722-23; *Liddy*, 509 F.2d at 437. The trial court's examination here adequately probed the question of prejudice and enabled the defendants to ascertain—within limits of reasonableness, and necessary adequacy—what the prospective

rogatories propounded by Ehrlichman.[9] These issues we take up in Part III.

II. Good Faith as a Defense to "Specific Intent" Under 18 U.S.C. § 241

The most substantial argument advanced by defendant Ehrlichman on appeal from his conviction under 18 U.S.C. § 241 [10] is that the District Court's mistaken legal

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jurors had heard about the case and the extent to which they might have made preliminary determinations about guilt or innocence. That examination did not reveal a deep seated prejudice against defendants that would make the voir dire procedure suspect.

Similarly, a continuance in the circumstances at bar is not required by *Delaney* v. *United States*, 199 F.2d 107 (1st Cir. 1952), where legislative hearings were held concerning the criminal activity to be tried. In this case, unlike *Delaney*, the Senate Watergate hearings occurred almost a year before the trial commenced and the defendants were not under indictment at the time of the hearings. It was therefore entirely proper to rely on the voir dire to determine whether there was any significant risk to a fair trial as a result of pre-trial publicity. The voir dire showed that no such risk existed and that an impartial jury could be empanelled.

[9] Ehrlichman also raises the argument that the trial judge, by gestures and facial expressions, indicated his disbelief of the testimony of the defendant and other defense witnesses, so as to unduly prejudice the jury against the defendant. We find no support for this argument in the trial record. Defense counsel made no objection at trial to any allegedly prejudicial action of the trial judge, and he details no such conduct to this court. *See Billeci* v. *United States*, 87 U.S. App. D.C. 274, 282, 184 F.2d 394, 402 (1950). Moreover, the trial court specifically instructed the jury to disregard any mannerisms of his that they might have interpreted as indicating a position on any of the facts to be decided. Tr. 2508-09. In view of the foregoing, Ehrlichman's attack on the impartiality of the trial judge's demeanor must be dismissed as frivolous.

[10] Section 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured him by the Constitution or laws of the United States, or because of his having so exercised the same; or
>
> If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment or any right or privilege so secured—
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 241 (1972).

view of the statute's "specific intent" requirement led the court to commit reversible error, both in ruling on the admissibility of certain evidence sought to be introduced by him and in instructing the jury on the basic elements of the offense. Not every conspiracy affecting a citizen's constitutional rights falls within the prohibition of section 241. It is settled law that "the offender must act with a specific intent to interfere with the federal rights in question. . . ." [11] Ehrlichman contends that he acted without the requisite "specific intent" to invade Dr. Fielding's Fourth Amendment rights, since he agreed to a search of the doctor's office in the good faith belief that it would involve no violation of the law, constitutional or otherwise.[12]

Prior to trial Ehrlichman and his co-defendants presented this theory of the case to the District Court in connection with motions for discovery of certain national security information.[13] They took the position that the

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[11] *United States* v. *Guest*, 383 U.S. 745, 753-54 (1966), citing *Screws* v. *United States*, 325 U.S. 91 (1945) and *United States* v. *Williams*, 341 U.S. 70, 93-95 (1951) (Douglas, J., dissenting).

[12] *See* note 62 *infra*.

[13] *United States* v. *Ehrlichman*, 376 F.Supp. 29 (D.D.C. 1974).

information would provide factual support for their asserted belief in the legality of the Fielding operation. The District Court rejected the defendants' theory, and their motions, in the following language:

> Defendants contend that, even if the break-in was illegal, they lacked the specific intent necessary to violate section 241 because they reasonably *believed* that they had been authorized to enter and search Dr. Fielding's office. As explained above, however, such authorization was not only factually absent but also legally insufficient, and it is well established that a mistake of law is no defense in a conspiracy case to the knowing performance of acts which, like the unauthorized entry and search at issue here, are *malum in se*. [Cites] As the Supreme Court said in Screws v. United States, 325 U.S. 91, 106, 65 S.Ct. 1031, 1037, 89 L.Ed. 1495 (1945), "[t]he fact that the defendants may not have been thinking in constitutional terms is not material [to a charge under § 242, a related specific intent statute,] where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." Here, defendants are alleged to have intended to search Dr. Fielding's office without a warrant, and their mistaken belief that such conduct did not offend the Constitution would not protect them from prosecution under section 241. *See also* Williams v. United States, 341 U.S. 97, 101-102, 71 S.Ct. 576, 95 L.Ed. 774 (1951).[14]

As a result of the District Court's ruling, Ehrlichman was restricted during the trial in his ability to obtain and introduce evidence of the national security circumstances surrounding the Fielding operation. At the end of the trial, the court rejected jury instructions which provided that belief in the legality of one's conduct could negate "specific intent" under section 241, and advised

[14] *Id.* at 35.

the jury that the requisite intent would be established under section 241 if the Prosecutor showed simply "that the object of the conspiracy and the purpose of each defendant was to carry out a warrantless entry into and search of Dr. Fielding's office without permission."[15]

The trial judge's position, as set forth in both his pre-trial opinion and in his instructions to the jury, unquestionably states the law with regard to the vast majority of criminal conspiracies. Even though all such conspiracies are crimes of "specific intent"—in that the defendant must not only combine with others but also intend to commit unlawful acts[16]—generally there is no requirement that the conspirator know those acts to be unlawful.[17] A mistake as to the legality of the prohibited activity, therefore, is no defense.[18]

The doctrine that a mistake of law will not excuse a crime normally applies in conspiracy cases even when

[15] Tr. 2525.

[16] *See* Perkins on Criminal Law 629 (2nd ed. 1969).

[17] "Thus, an agreement to do an act that, unknown to the parties, is a crime, is criminal." Williams, Criminal Law: The General Part 678 (2nd ed. 1961). As the District Court recognized, however, knowledge of the illegality of the target offense *has* been construed as a necessary element of conspiracy when the offense was not "malum in se." *See* text accompanying note 14, *supra*; Perkins, *supra* note 16, at 630-31; Williams, *supra*, at 288 n.4. This exception is not relevant here, since an unauthorized entry and search is clearly *malum in se*.

[18] There are a number of limited, situational exceptions to this general rule. *See generally* Williams, *supra* note 17, at 293-345; Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641 (1941). Barker and Martinez invoked such an exception in the lower court, independent of the "specific intent" requirement of section 241, based upon their claim of reasonable reliance on Hunt's authority to organize the break-in. This issue is taken up in our opinions in Nos. 74-1883 and 74-1884.

the target offense itself has "specific intent" as an element.[19] The reason for this is that the mental state required for most "specific intent" offenses does not involve knowledge of illegality.[20] If the recognition of the unlawfulness of one's action is not an element of the substantive crime, neither is it a component of the offense of agreeing to commit the crime.

Significantly, however, some "specific intent" crimes can be committed only if the defendant performs the *actus reus* with an intention to violate the law, or without ground for believing his action is lawful. A good faith mistake as to the legality of his activity, or failure to act, is a valid defense to prosecution for such a crime.[21] Equally important, such a mistake necessarily also constitutes a defense to a charge of conspiracy to commit this kind of "specific intent" crime.

In sum, whether the District Court properly rejected the good faith defense proffered by Ehrlichman is a question whose answer rests, in the first instance, on the *mens rea* required to commit the target offense under section 241. We examine the nature of that section's "specific intent" requirement in Subsection A and apply

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[19] It is conventional doctrine that a conspiracy to commit a burglary is not excused because it is carried out in the erroneous belief that the action taken is legal. For differing views for exceptional circumstances see Wilkey, J., dissenting in *United States* v. *Barker*, —— U.S. App. D.C. ——, 514 F.2d 208, 263-70 (1975).

[20] *See* Perkins, *supra* note 16, at 762-64.

[21] See, e.g., *United States* v. *Murdock*, 290 U.S. 389 (1933) (defendant could not be convicted for criminal violation of tax laws if he acted in good faith belief his conduct was lawful); *People* v. *Weiss*, 276 N.Y. 384, 12 N.E. 2d 514 (1938) (good faith belief in legality of civil arrest was defense to kidnapping charge where statute required intent to act "without authority of law"). See *United States* v. *Barker*, —— U.S. App. D.C. ——, ——, ——, 514 F.2d 208, 234, 265 (1975) (Bazelon, C.J., concurring and Wilkey, J., dissenting).

our legal findings to the facts surrounding the Fielding break-in in Subsection B, *infra*. Our conclusion is that under the circumstances of this case the District Court did not err in rejecting the defendant's good faith defense.[22]

A. *The "Specific Intent" Requirement of Section 241*

1. *Screws* v. *United States*

The substantive counterpart to section 241 is 18 U.S.C. § 242, which provides in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

The seminal case dealing with the element of *mens rea* under section 242 is *Screws* v. *United States*.[23] The defendants in *Screws*, law enforcement officials who had beaten a prisoner to death, were charged with denying that individual various of his due process rights under the Fourth Amendment. They countered with an attack on the constitutionality of section 242—arguing that if it incorporated such a large body of changing and uncertain law as surrounds the concept of due process, the statute lacked the basic specificity essential to criminal statutes under our legal system.[24]

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[22] In our opinions in *United States* v. *Barker and Martinez*, Nos. 74-1883 & 74-1884, we take up an alternative good faith defense proffered by defendants Barker and Martinez, based not upon the particular requirements of section 241, but upon their claim of reasonable reliance on apparent authority.

[23] 325 U.S. 91 (1945).

[24] *Id.* at 94-96.

The Court acknowledged that this "vagueness" challenge would be serious if the "customary standard" of guilt for statutory crimes were applied under section 242.[25] The presence of the term "willfully" in the statute, however, afforded the Court a convenient means for narrowing its potential reach—not only to fulfill the constitutional requirement of specificity but also to prevent the federal statute from becoming a "catchall" which might interfere with the traditional law enforcement role of the states.[26] The Court noted, first, that precise construction of the word "willful" in a statute was dependent on its context. "But 'when used in a criminal statute it generaly means an act done with a bad purpose.'" [27] It requires a particular intent in addition to the performance of the act required by the statute.

The Court determined that for the purposes of section 242 acting "willfully" meant acting with "a purpose to deprive a person of a specific constitutional right," [28] "made definite by decision or other rule of law." [29] Such a construction, in the Court's view, would cure the problem of vagueness presented by the statute:

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[25] *Id.* at 96. That standard was defined by the Court as follows:

> "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

Ibid., quoting Mr. Justice Holmes in *Ellis* v. *United States*, 206 U.S. 246, 257 (1907).

[26] 325 U.S. at 105.

[27] *Id.* at 101, *quoting United States* v. *Murdock*, 290 U.S. 389, 394 (1933).

[28] 325 U.S. at 101.

[29] *Id.* at 103.

> One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applies to him . . . for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right . . . . The Act would then not become a trap for law enforcement agencies acting in good faith. "A mind intent upon willful evasion is inconsistent with surprised innocence." United States v. Ragen, [314 U.S. 513, 524 (1942).] [30]

The Court observed that the indictment in *United States* v. *Classic*,[31] an earlier case involving section 242, met the test of "specific intent" it had just laid down. That indictment charged the defendants with, *inter alia*, the willful alteration of ballots. Such alteration, the Court emphasized, clearly breached a right expressly guaranteed by the Constitution—*viz.*, the right to vote. The indictment did not charge that the defendants had acted with the specific intent to deprive voters of their constitutional prerogatives. Nevertheless, the Court concluded:

> Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which [§ 242] uses the term. *The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of constitutional prohibitions or guarantees.*[32]

Turning to the charge against the defendants in *Screws* itself, the Court observed, "Likewise, it is plain that

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[30] *Id.* at 104.

[31] 313 U.S. 299 (1941).

[32] 325 U.S. at 106 (emphasis added).

basic to the concept of due process of law in a criminal case is a trial—a trial in a court of law, not a 'trial by ordeal.'" [33] No allegation of intent to breach a constitutional right, therefore, was necessary. The Court held that the "specific intent" requirement of section 242 would be met if the jury were instructed simply that to convict they must find the defendants had beaten their prisoner to death with the particular purpose of subjecting him to a trial by ordeal."[34]

2. *The Meaning of* Screws

Although some of the language in *Screws* can be read more broadly, its holding essentially sets forth two requirements for a finding of "specific intent" under section 242. The first is a purely legal determination. Is the constitutional right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that federal right? If both requirements are met, even if the defendant did not in fact recognize the unconstitutionality of his act, he will be adjudged as a matter of law to have acted "willfully"—*i.e.*, "in reckless disregard of constitutional prohibitions or guarantees."

These "specific intent" requirements, grafted by the Supreme Court onto the elements of a section 242 violation, met the Court's twin concerns of vagueness and federalism in *Screws*. On the one hand, the requirement that the constitutional right in question be clearly established provides the specificity needed for a criminal statute to meet minimal standards of due process. On the other hand, the requirement that the defendant have

[33] *Id.*

[34] *Id.* at 107.

a purpose to infringe federally protected interests preserves the states' traditional prerogative to prosecute and punish those who commit ordinary crime. For example, as *Screws* illustrates, the Constitution clearly grants protection to a citizen's interests in not being punished by governmental officials without a trial. There is no violation of section 242, however, if a sheriff and his deputies commit a murder for purely personal, nongovernmental reasons. The state can, and should, deal with such crime. Section 242 comes into play only if the object of the murder was to punish a prisoner for past illegal acts, or for some other purpose stemming from the official position of those committing the homicide.

The same principles apply to prosecutions for conspiracy under section 241. Although the language of sections 241 and 242 is somewhat different—indeed, section 241 does not contain the word "willfully" [35]—the Supreme Court has made clear since *Screws* that the "specific intent" requirements of section 242 are equally applicable (or derivatively applicable) to section 241.[36] In *United States* v. *Guest*,[37] decided in 1966, the Court reversed the dismissal of an indictment charging the defendants with violating section 241 by, *inter alia*, conspiring to intimidate blacks in the free exercise of the right of interstate travel. The Court observed, first, that the rights of equal utilization of public facilities and freedom of travel had been firmly established and repeatedly recognized; therefore, the requirement of constitutional clarity presented no difficulty.[38] Second, the

[35] *See* note 10 *supra*.

[36] *See United States* v. *Price*, 383 U.S. 787, 806 n.20 (1966). Logically, such an extension of the "specific intent" requirement to section 241 was necessary to avoid the same charge of vagueness levelled against section 242 in *Screws*.

[37] 383 U.S. 745.

[38] *Id.* at 753-54, 757-59.

Court noted with reference to the right to travel that under *Screws* not every criminal conspiracy which incidentally interfered with that right is prohibited by section 241. A conspiracy to rob a private person who happens to be traveling interstate, for example, would not violate section 241, because it would entail no purpose to invade federally protected interests.[39] On remand, therefore, the Court found that the prosecution would have to show the defendants conspired to intimidate an individual *because* he was traveling interstate.[40]

Most recently, in *Anderson* v. *United States*,[41] decided in 1974, the Court reaffirmed and further elucidated the "specific intent" requirements of section 241. Since the constitutional right in question was the right to an equal vote in a federal election, the defendants' convicted of casting false votes could not be assailed on the ground that the federal interests involved were not clear and firmly established.[42] Rather, the main issue was whether an intent to invade those federal interests had been proven, in view of the fact that the primary objective of the conspiracy was to influence a local election—even though false votes had been case for candidates for federal office as well. The Court found adequate evidence of "specific intent," concluding:

> A single conspiracy may have several purposes but if one of them—whether primary or secondary—be

[39] *Id.* at 760.

[40] It seems clear that a purpose to commit acts designed to interfere with his interstate travel was sufficient; the Court did not suggest that the defendants would have had to be thinking in terms of the constitutional right to travel which the courts have found in the interstices of the Constitution. *See* Part III of the writer's opinion in *United States* v. *Barker and Martinez*, Nos. 74-1883 & 74-1884.

[41] 417 U.S. 211.

[42] *Id.* at 226.

> the violation of federal law, the conspiracy is unlawful under federal law.
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> That petitioners may have had no purpose to change the outcome of the federal election is irrelevant. The specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots.[43]

Screws and its progeny thus compel the conclusion that the specific intent required to violate section 241 is the purpose of the conspirators to commit acts which deprive a citizen of interests in fact protected by clearly defined constitutional rights. If that purpose was present, there is no "good faith" defense, such as Ehrlichman proffers, because of lack of awareness of the conspirators at the time they commit the proscribed acts that they are violating constitutional rights. There is no requirement under section 241 that a defendant recognize the unlawfulness of his acts.

It should be added here that there is also no support for Ehrlichman's position in any of the recognized common law exceptions to the mistake of law doctrine, which are developed more fully in our opinions in the companion decision on Barker and Martinez. Ehrlichman's reliance on *Pierson* v. *Ray*[44] is misplaced. In *Pierson* the Supreme Court held that a police officer sued under 42 U.SC. § 1983 for an unlawful arrest could raise as a defense his reliance on a statute which he *reasonably*

[43] *Id.*

[44] 386 U.S. 547 (1967).

believed to be valid but which was later held unconstitutional. Assuming *arguendo* that an analogous defense should be made available in a criminal case,[45] it still cannot avail the defendant here. As is detailed in Subpart II.B., *infra*, the violation of the Fourth Amendment in this case was clear. Ehrlichman cannot and does not argue that he should be allowed a defense based upon his reasonable reliance on an apparently valid statute or judicial decision, nor does his invocation of the claimed foreign affairs exception to the warrant requirement avail him, for even the claim of a foreign affairs exception has consistently been conditioned on specific approval by the President or the Attorney General. Ehrlichman was himself a high government official. He does not contend that specific judicial or Presidential approval was obtained for the Fielding break-in. He simply asserts that it was his belief that the break-in was lawful notwithstanding the absence of any such specific approval. Such a mistake of law can be no defense. Neither *Pierson* nor any other authority countenances an exception to the mistake of law doctrine in such a situation.

It still remains to determine whether the instructions the court gave the jury met the two-pronged test of "specific intent" laid down in *Screws*. We turn now to this inquiry.

B. *Conformity of Jury Instructions with "Specific Intent" Requirements*

1. *The Requirement that the Protected Right Be Firmly Established and Plainly Applicable*

Defendant Ehrlichman is charged with violating Dr. Fielding's Fourth Amendment rights by conspiring in

[45] *See* Model Penal Code § 2.04.

the breaking and entering of his office. The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Although the best means of protecting this right against incursions by "overzealous executive officers" [46] has been subject to some debate,[47] the core meaning of the Fourth Amendment was clear well before defendants conspired to search Dr. Fielding's files:

> [T]ransiation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task. . . . Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. . . .[48]

United States v. *United States District Court (Keith)* capsulized that historic approach in noting that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." [49] "The

[46] *Gouled* v. *United States*, 255 U.S. 298, 304 (1921), *quoted in Coolidge* v. *New Hampshire*, 402 U.S. 443, 481 (1971).

[47] *See, e.g., Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914).

[48] *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

[49] 407 U.S. 297, at 313 (1972).

very heart of the Fourth Amendment directive" [50] is that "where practical, a government search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation." [51] The framers formulated that directive against the background of *Entick* v. *Carrington*,[52] a case found by the Supreme Court in *Boyd* v. *United States* [53] to be "sufficiently explanatory of what was meant by unreasonable searches and seizures." *Entick* overturned an executive warrant to search the studies of political dissidents.[54]

As a general proposition, few would question the clarity of the Fourth Amendment right of every citizen to be free from governmental searches and seizures unless sanctioned by judicial warrant based on probable cause. For the purposes of section 241, however, that right may not be clear in an individual case if the circumstances are such that an exception to the warrant requirement may be invoked. Just how clear was Dr. Fielding's right to be free from the search directed by defendant Ehrlichman is the question we examine at this point.

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[50] *See* citation of *Leach* v. *Three of the Kings Messengers*, 19 How. St. Tr. 1001, 1027 (1765), in *United States* v. *U.S. District Court*, 407 U.S. at 316.

[49] 407 U.S. 297, 313 (1972).

[52] 95 Eng. Rep. 807 (1765).

[53] 116 U.S. at 627.

[54] *Entick*, along with *Wilkes* v. *Wood*, 19 How. St. Tr. 1153, 98 Engl. Rep. 489 (1763), was also cited in *Coolidge* v. *New Hampshire*, 403 U.S. at 455, as an example of "legal and constitutional means" securing "a right of personal security against arbitrary intrusions by official power."

In pre-trial proceedings before the District Court Ehrlichman claimed that the break-in was not in violation of Dr. Fielding's Fourth Amendment rights and developed a contention along the following lines: The entry was undertaken pursuant to an authorized "foreign affairs" or "national security" operation. Since 1940 the "foreign affairs" exception to the prohibition against wiretapping has been espoused by the Executive Branch as a necessary concomitant to the President's constitutional power over the exercise of this country's foreign affairs, and warrantless electronic surveillance has been upheld by lower federal courts on a number of occasions.[55] No court has ruled that the President does not have this prerogative in a case involving foreign agents or collaborators with a foreign power.[56] The Supreme Court, in a number of decisions requiring officials to obtain a warrant before engaging in electronic surveillance, has been careful to note that its rulings do not reach such cases.[57]

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[55] Memorandum from President Roosevelt to Attorney General Jackson, May 21, 1940, reproduced in *United States* v. *Barker*, —— U.S. App. D.C. ——, 514 F.2d 208, 246-48 (MacKinnon, J., dissenting) (1975) (subsequent authorizations of President Truman and Johnson also reproduced); United States v. Butenko, 494 F.2d 593 (3d Cir. 1974); United States v. Brown, 484 F.2d 418 (5th Cir. 1973). On 24 June 1975 Attorney General Levi reasserted this steadfastly maintained position of the Executive Branch in a letter to Senator Edward Kennedy. Petition for Rehearing in *Zweibon* v. *Mitchell*, No. 73-1847, Appendix I.

[56] For the first time, this court in *Zweibon* v. *Mitchell*, —— U.S. App. D.C., ——, 516 F.2d 594 (1975), *cert. denied*, 44 U.S.L.W. —— (19 April 1976) recently held that the scope of the foreign affairs exemption did not extend to "foreign affairs" cases where the targets of a surveillance were not in collaboration with a foreign power.

[57] *United States* v. *United States District Court*, 407 U.S. 297, 321-22 (1972); *Giordano* v. *United States*, 394 U.S. 310, 313-14 (1969) (concurring opinion of Stewart, J.); *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967).

Hoping to fall within this as yet not fully defined exception, Ehrlichman urges that in September 1971 "in a matter affecting national security and foreign intelligence gathering" the absence of a judicially approved warrant did not render unlawful "a search and seizure authorized by a presidential delegate pursuant to a broad Presidential mandate of power given to that delegate." [58]

Ehrlichman further argues that no specific authorization by the President or the Attorney General was required:

> Implicitly, an instruction to accomplish an end carries with it the duty of performing all lawful acts necessary to accomplish that end. In the instant case, the President delegated the power, to sworn officials of the Executive Branch, including Appellant Ehrlichman, to prevent and halt leaks of vital security information. To contend that the President must specifically chart out the methods of employing the power, each and every time he delegates power is absurd.[59]

The District Court ruled as a matter of law that the national security exemption did not excuse the failure to obtain a judicial warrant for a physical search of Dr. Fielding's office [60] either because there is no exemption for physical searches [61] or because the exemption can only be invoked by the President or the Attorney General in a particular case.[62] This holding, which governed

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[58] Ehrlichman Br. at 14.

[59] Ehrlichman Reply Br. at 4.

[60] 376 F. Supp. 29 (1974).

[61] *Id.* at 33-34.

[62] *Id.* at 34-35.

pre-trial discovery instructions to the jury, blocked any evidentiary inquiry into the factual basis for Ehrlichman's alleged belief that the Fielding "covert operation" could yield significant foreign intelligence information. For purposes of this appeal, we accept as possible of proof that probable cause existed for the operation, so that if application for a warrant had been made it would have been granted.

The District Court's ruling was based on two premises. The first is that the "national security" exemption has been "carefully limited to the issue of wiretapping, a relatively nonintrusive search." [63] The circuit court decisions setting forth such an exemption for "the special problem of national security wiretaps" [64] do not go so far as to dispense with the need for a warrant as a requirement for "physical entry of the home . . . the chief evil against which the wording of the Fourth Amendment is directed." [65] We need not in this opinion decide this matter one way or the other, and no inference should be drawn from our failure to discuss it. It suffices to dispose of the case at bar that we find that the District Court was unquestionably correct in its second ground for rejecting Ehrlichman's claim, in its ruling that in any event the "national security" exemption can only be invoked if there has been a specific authorization by

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[63] *Id.* at 33.

[64] *Id.* The District Court cited *United States* v. *Butenko*, 494 F.2d 593 (3rd Cir. 1974); *United States* v. *Brown*, 484 F.2d 148 (5th Cir. 1973); *Zweibon* v. *Mitchell*, 363 F. Supp. 936 (D.D.C. 1973), *rev'd*, —— U.S. App. D.C. ——, 516 F.2d 594 (1975), *cert. denied*, 44 U.S.L.W. —— (19 April 1976).

[65] *Id.* at n. 3, quoting *United States* v. *United States District Court*, 407 U.S. at 313. The position of the Attorney General of the United States with regard to auditory and visual searches is discussed by Judge Leventhal in his concurring opinion herein and by Judge Wilkey in his opinion in the case of Barker and Martinez.

the President, or by the Attorney General as his chief legal advisor, for the particular case.

Neither Ehrlichman nor any of his codefendants have alleged that the Attorney General gave his approval to the Fielding operation; and none has attempted to refute former President Nixon's assertion that he had no prior knowledge of the break-in and, therefore, could not and did not authorize the search.[66] Ehrlichman soars into a novel claim of authority. No court has ever in any way indicated, nor has any Presidential administration or Attorney General claimed, that any executive officer acting under an inexplicit Presidential mandate may authorize warrantless searches of foreign agents or collaborators,[67] much less the warrantless search of the offices of an American citizen not himself suspected of collaboration.

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[66] Indeed, for Ehrlichman to argue that the President gave his express authorization to a surreptitious entry and search of Dr. Fielding's office would have been patently inconsistent with Ehrlichman's primary defense at trial. Such authorization would have been transmitted to the "Room 16" unit through Ehrlichman, and he claimed not to have known the unit planned a surreptitious entry and search. The trial judge, however, put the question of Ehrlichman's prior knowledge of the break-in squarely to the jury (Tr. 2531), and they found him guilty as charged.

[67] *Cf. United States* v. *Coplon*, 185 F.2d 629, 635 (2d Cir. 1950) (warrantless arrest of Justice Department employee apparently engaged in passing defense information to a Soviet agent held inconsistent with statutory requirements; no consideration was given any national security justification for such an arrest); *Abel* v. *United States*, 362 U.S. 217 (1960); (valid search incident to a deportation arrest upheld which produced evidence of espionage activities; the Court nevertheless noted that "the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.") at 226.

The defendant totally misapprehends the critical role played by the President and the Attorney General, when the "national security" exception is invoked. It is argued that this exception gives government officials the power surreptitiously to intrude on the privacy of citizens without the necessity of first justifying their action before an independent and detached member of the judiciary. Unless carefully circumscribed, such a power is easily subject to abuse. The danger of leaving delicate decisions of propriety and probable cause to those actually assigned to ferret out "national security" information is patent, and is indeed illustrated by the intrusion undertaken in this case, without any more specific Presidential direction than that ascribed to Henry II vexed with Becket.[68] As a constitutional matter, if Presidential approval is to replace judicial approval for foreign intelligence gathering, the personal authorization of the President—or his alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the President's prerogative.

Mr. Justice White, concurring separately in *Katz* v. *United States*,[69] noted the possibility of recognizing a "national security" exception to the warrant requirement for electronic surveillance, but only if "the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable."[70] As of this writing, that is the only

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[68] Attributed as "Who will free me from this turbulent priest?"

[69] 389 U.S. 347, 362 (1967).

[70] *Id.* at 364.

statement by any Supreme Court Justice declaring a national security exemption. Mr. Justice Stewart, concurring in *Giordano* v. *United States*, noted that "[w]hile two members of the Court have indicated disagreement with that view, the issue remains open." [71] Moreover, the Government in its brief before the Supreme Court in *United States* v. *United States District Court (Keith)*,[72] stated flatly, "We urge the Court to adopt the principle that Mr. Justice White suggested in his concurring opinion in *Katz*." [73] The Government's argument was based in substantial part on the protection and consistency that would derive from a procedure centered on the Attorney General himself. The Court in *Keith* noted that ". . . the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government." [74] Yet even this expression was in the context of an opinion that held the Constitution required a judicial warrant as a condition for conducting domestic security surveillance,[75] and disclaimed expression of any ruling on the requirement applicable in the case of activities of foreign powers or their agents.[76]

As a historical matter, Presidential memoranda from 1940 to 1965 setting forth Executive policies regarding national security electronic surveillance have stressed the requirement of personal approval by the President or

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[71] 394 U.S. 310, 315 (1969).

[72] 407 U.S. 297 (1972).

[73] Gov't Br. at 11.

[74] 407 U.S. at 310.

[75] 407 U.S. at 314-15.

[76] *Id.* at 321-22.

the Attorney General,[77] even though at the time the Supreme Court had held that the Constitution did not require a warrant for such surveillance. No court, Justice of the Supreme Court, or Presidential administration has ever suggested a power which could be generally delegated, for example, even to regular intelligence agencies, like the FBI and CIA, let alone to the extra-statutory group involved in the instant case. Even though the employees and administrators of the regular agencies might have the background, training, and departmental discipline to make responsible, expert decisions, the risk of their myopic abuse of such a powerful prerogative is simply too great to permit its delegation. That risk is substantially magnified when the decision-making group, as here, is an amorphous, *ad hoc* unit with no tradition of public service and no clear lines of responsibility.

Skepticism of power to delegate "authority at will" to make crucial decisions in the Fourth Amendment area led the Supreme Court to hold invalid a delegation within the Department of Justice of the statutory power to authorize even the *application* for a wiretap warrant to be issued by a magistrate once a probable cause determination is made. The Court insisted that "[t]he mature judgment of a particular. responsible Department of Justice official [be] interposed as a critical precondition to any judicial order." [78] *A fortiori*, when what is involved is a claim that an exception permits a Chief Executive determination to replace the neutral magistrate altogether, that determination cannot be dele-

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[77] *See, e.g.*, Appendix to dissenting opinion of Judge MacKinnon, *United States* v. *Barker*, —— U.S. App. D.C. ——, ——, 514 F.2d 208, 246-48 (1975).

[78] United States v. Giordano, 416 U.S. 505, 515-16 (1974), construing 18 U.S.C. § 2516(1) (1970).

gated. Talismanic invocation of "national security" is not a basis for delegation, it is at most a basis for the claim that there may be a "Chief Executive warrant."

Although Ehrlichman's counsel speak broadly of Presidential authorization, all that they show is that the President authorized the formation of a unit within the White House to stop security leaks and investigate the Ellsberg matter.[79] At no point did the President even mention the possibility of surreptitious wiretaps or other "national security" searches—let alone give any specific authorization for such activity. The law is plain that the simple fact that the President asks a subordinate official to investigate and report on a problem involving national security does not give the official plenary power to exercise all prerogatives the President might have in that area.

Ehrlichman can hardly mean that the President intended to give him all the power that he, the President, had. Obviously, the most that could be argued was the authority to perform "lawful acts necessary to accomplish that end." [80] Whatever the rule for the President, the delegate may not claim, as lawful acts, those which could not be lawfully delegated to his discretion.

As a constitutional matter, if and to the extent that Presidential approval may replace judicial approval for foreign intelligence gathering, the personal authorization of the President—or of his Cabinet alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the Presidential prerogative.

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[79] 9 Weekly Compilation of Presidential Documents, No. 21, at pp. 695-96 (22 May 1973).

[80] Ehrlichman Reply Br. at 4.

Under the circumstances of this case, the law is clear that Dr. Fielding's Fourth Amendment rights were breached when the defendants broke into and searched his office without the requisite judicial authorization. For the purposes of the element of "specific intent" in section 241, it remains only to determine whether the defendants acted with the necessary purpose of trenching upon constitutionally protected interests.

2. *The Requirements of a Purpose to Invade Constitutionally Protected Interests.*

As we observed above in connection with our discussion of *Screws* and its progeny, "specific intent" under section 241 does not require an actual awareness on the part of the conspirators that they are violating constitutional rights. It is enough that they engage in activity which interferes with rights which as a matter of law are clearly and specifically protected by the Constitution. As we have already pointed out, in this case the law clearly establishes a violation of Dr. Fielding's Fourth Amendment right to be secure against the warrantless entry and search, the exceptions for entry without a judicial warrant being plainly inapplicable.

It is not a violation of section 241 for individuals who happen to be government agents to burglarize a doctor's office for purely personal gain. It *is* a civil rights conspiracy in violation of that section, however, if they enter his office in their capacity as government agents without proper authorization to secure information for an ostensible government purpose. The concern of Congress in enacting section 241 was to extend the federal police power to those who intentionally interfere with federally protected interests—*e.g.*, officials whose specific purpose is to accomplish the governmental objectives of punishment or obtaining confessions or searching private premises,

individuals who act with the particular intent of preventing other citizens' equal use of the polls or the interstate highways. The objective must be governmental even though section 241, unlike section 242, does not require that conspirators act under color of law. The states can deal with those who kill or mug or burglarize out of passion or greed for purely personal reasons.

The District Court instructed the jury as follows:

> To establish a violation of count one of the indictment, the conspiracy count, the prosecutor must prove beyond a reasonable doubt, first, that a conspiracy existed between one or more defendants or unindicted co-conspirators named in the indictment.
>
> Second, that the purpose of the conspiracy was to carry out a warrantless entry and search of Dr. Fielding's office without his permission.
>
> Third, that the conspirators were governmental employees or agents who intended to enter and to search Dr. Fielding's office without a warrant or permission for governmental rather than purely personal reasons.
>
> Fourth, that Dr. Fielding himself was at the time an American citizen.[81]

These instructions state the law exactly as we have outlined it, and Ehrlichman does not contest that if those instructions were legally correct there was substantial evidence to sustain his conviction under section 241.[82]

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[81] Tr. at 2524-25.

[82] Ehrlichman's co-defendants, Barker and Martinez, argue —citing *United States* v. *Guest*, 383 U.S. 745 (1966)—that the trial judge erred in failing to instruct the jury that a conviction under section 241 is only possible if the violation of federal rights is the predominant purpose of the conspiracy. I discuss this argument in Part III of my opinion in *United States* v. *Barker and Martinez*, Nos. 74-1883 & 74-1884, and

Thus, we conclude that Ehrlichman's conviction of conspiracy as set forth in Count I of the indictment was in full compliance with the *mens rea* requirements of section 241. We turn now to a brief discussion of the defendant's remaining contentions on appeal.

III. Subsidiary Issues

A. *Severance*

The District Court's refusal to grant Ehrlichman's request for a severance can constitute grounds for reversal only if the defendant sustains the burden of showing a clear abuse of discretion by the court.[83] Ehrlichman relies primarily on an alleged inconsistency between his defense and that of his co-defendants, but it appears axiomatic that "the mere presence of hostility among defendants or the desire of one to exculpate himself by inculpating another [are] insufficient grounds to require separate trials." [84] To obtain a severance on the ground of conflicting defenses, "[a]t the very least, it must be demonstrated that a conflict is so prejudicial that differences are irreconcilable, and that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' " [85]

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reject it under the recent authority of *Anderson* v. *United States*, 417 U.S. 211 (1974).

[83] *See, e.g., Opper* v. *United States* 348 U.S. 84, 95 (1954); *United States* v. *Isaacs*, 493 F.2d 1124, 1159 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *United States* v. *Gambrill*, 146 U.S. App. D.C. 72, 83, 449 F.2d 1148, 1159 (1971); *Brown* v. *United States*, 126 U.S. App. D.C. 134, 139, 375 F.2d 310, 315 (1966), *cert. denied*, 388 U.S. 915 (1967).

[84] *United States* v. *Barber*, 442 F.2d 517, 530 (3rd Cir.), *cert. denied*, 404 U.S. 958 (1971). *See also Allen* v. *United States*, 91 U.S. App. D.C. 197, 202, 202 F.2d 329, 334, *cert. denied*, 344 U.S. 869 (1952).

[85] *United States* v. *Robinson*, 139 U.S. App. D.C. 286, 289, 432 F.2d 1348, 1351 (1970). *See also United States* v. *Wilson*,

No such irreconcilable inconsistency of defenses is shown here. Ehrlichman asserts that Liddy, Barker, and Martinez effectively contended that he had approved the break-in; and as their "superior" he, not they, should be held responsible for the break-in. At no point, however, did Liddy assert that he had acted under Ehrlichman's orders, nor did he argue that Ehrlichman had approved the Fielding entry and search. Rather, his defense was based upon the belief that a warrant had been obtained.[86] Liddy's references to Ehrlichman's position as "nominal supervisor" of the "Room 16" unit,[87] his place in the White House chain of command,[88] and his familiarity with the President's instructions to the unit[89] do not—contrary to Ehrlichman's contention [90]—constitute a charge that Ehrlichman specifically approved a surreptitious entry. There would have been no logical inconsistency in the jury's acceptance of the defenses presented by both defendants.

Even less tenable is the argument that the defense of Barker and Martinez trenched upon that of Ehrlichman. They made no reference whatever to Ehrlichman in pre-

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140 U.S. App. D.C. 220, 226-28, 434 F.2d 494, 500-02 (1970); *Rhone* v. *United States*, 125 U.S. App. D.C. 47, 48, 365 F.2d 980, 981 (1966).

[86] Tr. 2432, 2440-2444. The trial judge instructed the jury that if they believed Liddy's contention, it would constitute a mistake of fact which would absolve Liddy of the mens rea required for conviction under section 241. Tr. 2525. The jury's guilty verdict reflects a necessary finding that Liddy entertained no such belief.

[87] Tr. 598.

[88] Tr. 2432B.

[89] Tr. 2438.

[90] Ehrlichman Br. at 52-53.

senting their claim of good faith belief in apparent authority. Their defense was based on the circumstances of their relationship with Hunt. It was totally irrelevant to Barker's and Martinez's position whether Ehrlichman had or had not approved the break-in, for they made no claim of such specific knowledge.

Ehrlichman also relies on the "*De Luna* doctrine" [91] to support his request for severance. He claims that the District Court's refusal to sever, which precluded any comment by him on Liddy's failure to take the stand, unduly prejudiced his defense. It would appear clear, however, that severance is not required simply because one defendant may wish to comment on another's refusal to testify.[92] In *De Luna*, two defendants, tried jointly on narcotics charges, each claimed the other was solely responsible. In the presence of mutually exclusive and irreconcilable defenses, the importance to one defendant of the ability to comment on the silence of his co-defendant was overwhelming. No such inconsistent defenses are present here, and Liddy was the only one of seven of Ehrlichman's alleged co-conspirators who failed to take the stand. Under these circumstances, we do not find that the District Court abused its discretion in refusing to sever Ehrlichman's trial from that of his co-defendants.[93]

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[91] *De Luna* v. *United States*, 308 F.2d 140 (5th Cir. 1962).

[92] *See United States* v. *Barber*, 442 F.2d 517, 529-30 (3rd Cir.), *cert. denied*, 404 U.S. 958 (1971). Comment is all of which Ehrlichman could have been deprived. Even if separate trials had been granted, Liddy still could not have been compelled to testify.

[93] *See United States* v. *Hines*, 147 U.S. App. D.C. 249, 266, 455 F.2d 1217, 1334, *cert. denied*, 406 U.S. 975 (1972). *See also United States* v. *Roselli*, 432 F.2d 879, 902 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971).

B. *Ehrlichman's Discovery Rights*

Ehrlichman claims he was improperly denied his rights under Rule 16 of the Federal Rules of Criminal Procedure to the production of all evidence material to the preparation of his defense and, under *Brady* v. *Maryland*,[94] to all evidence "favorable to an accused." The Special Prosecutor asserts that he voluntarily produced all documents in his possession which were even remotely relevant to the issues to be tried. Further, he contacted all governmental departments, including the White House, which might be expected to have material possibly exculpatory of Ehrlichman or his co-defendants. These departments reported the results of their searches in affidavits. On appeal Ehrlichman apparently does not question the accuracy of these affidavits or their fulfillment of the prosecution's obligation to disclose relevant information to the defense,[95] with the exception of the affidavit filed by J. Fred Buzhardt on behalf of the White House. As to the Buzhardt affidavit, however, Ehrlichman failed to present any evidence before the District Court to support his argument here that Buzhardt's review generally was inadequate or his representations inaccurate.[96] Nor

[94] 373 U.S. 83 (1963).

[95] Although Ehrlichman's brief discourses at some length about the requirement under *Brady* that the prosecution turn over all relevant information, with the exception of the "Leaks" file (which we discuss below) he specifies on appeal no relevant material which was not handed over. In the absence of such specification, the government can do no more than examine possibly relevant files and make a good faith representation that relevant material does or does not exist. Certainly, there is no requirement of wholesale disclosure of all files which could conceivably contain relevant items. This applied here to White House files as well as files in the hands of the Special Prosecutor.

[96] Ehrlichman contends that he was improperly denied the opportunity to take the stand at a pre-trial hearing on the

has he presented any such evidence to us. Ehrlichman's broad challenge to the validity of Buzhardt's inspection of White House files for materials relevant to Ehrlichman's defense must fail.

We are left with the arguments made by Ehrlichman with respect to specific materials held by the White House which he desired produced.[97] The first of these were Ehrlichman's notes recording private Presidential conversations and meetings. As part of his overall review referred to above, Buzhardt examined those notes, found none bearing on the guilt or innocence of Ehrlich-

satisfaction of *Brady* requirements in order to establish the materiality and relevancy to his case of certain White House documents not turned over to him by Mr. Buzhardt. Our review of the transcript of that hearing reveals this contention to be groundless. Though repeatedly requested by the trial judge to specify just what documents Ehrlichman would discuss and why they might be relevant, counsel for the defendant was unable to give a single concrete example of how Ehrlichman's testimony would be helpful. The trial judge nevertheless offered to consider any motion or subpoena which might be drawn under Rule 16 or Rule 17 directed to any particular documents, describing their relevance and the reasonableness of their production. *See* text accompanying note 98 *infra*.

[97] Ehrlichman on appeal raises an argument, relying primarily on the Jencks Act, 18 U.S.C. § 3500 (1970), that he was improperly denied transcripts of testimony taken in executive session by the Subcommittee on Intelligence of the House Armed Services Committee. Ehrlichman, however, was specifically directed by the District Court to file written papers on this issue if he wished to join the motions of his co-defendant, G. Gordon Liddy, for the production of that testimony. Tr. 1972. He failed to file any papers, and so has waived his right to press this point on appeal. In any event, in our companion opinion in United States v. Liddy, No. 74-1885, Judge Merhige's considered rejection of the contention that the District Court's failure to procure these transcripts was reversible error is equally applicable here.

man or his co-defendants, but turned over Xerox copies of those that seemed conceivably relevant. Moreover, Ehrlichman was given full personal access to *all* the notes. In response to the trial judge's repeated request that Ehrlichman specify which notes of individual conversations he considered had been improperly withheld, Ehrlichman on 21 June 1974 filed a motion for the issuance of a subpoena *duces tecum* for the notes of ten different conversations. An accompanying memorandum detailed Ehrlichman's reasons for considering those particular notes material to his defense. In response to that motion the White House turned over the requested notes to the trial judge for *in camera* inspection. Also, on 24 June the Special Prosecutor filed a lengthy memorandum arguing the irrelevancy of each of the conversations sought to the issues at trial.[98] With the actual notes before him,

[98] The Special Prosecutor observed, first, that many of the enumerated notes—all but three of which recorded conversations which took place after the break-in occurred—were sought by Ehrlichman in order to disprove the allegation that he had attempted to conceal the break-in. The Prosecutor pointed out, however, that he had decided to drop concealment as part of the conspiracy charge. This rendered irrelevant those notes sought in order to disprove concealment.

Second, Ehrlichman claimed some of the notes would help show he did not have the requisite intent to violate Dr. Fielding's constitutional rights—that his motives were the laudatory ones of stopping security leaks and gathering information for legislative action. As the Special Prosecutor pointed out, however, good motives do not negative intent under section 241. Even assuming, *arguendo*, that his purpose was laudatory, to achieve it by unlawful means was still unlawful.

Finally, Ehrlichman argued some notes would show the President intended the "Room 16" unit to assume the functions of the F.B.I. and to act lawfully, rather than unlawfully. The Special Prosecutor observed that this fact was undisputed. The real question was whether the President had specifically authorized the unit to undertake the Fielding break-in; and Ehrlichman, with full access to his notes, made no allegation that such authorization had been given.

Judge Gesell found the Special Prosecutor's position persuasive and quashed the subpoena. We have reviewed these notes as well and find ourselves in complete accord with the trial judge's determination. With the exeption of the "Leaks" file, discussed below, Ehrlichman identifies on appeal no other specific documents or notes which were wrongfully denied him.

Nevertheless, Ehrlichman argues, first, that the District Court should have ordered the White House to submit to it all his notes of Presidential conversations and, apparently, all other White House material Ehrlichman requested for *in camera* inspection to determine their relevance. Even were this a case not involving "presumptively privileged Presidential files,"[99] Ehrlichman's failure to argue with specificity the materiality and reasonableness of his discovery request would render his position untenable.[100] In the face of the requirement for a "demonstrated specific need" for the evidence or a showing "that the Presidential material was 'essential to the justice of the [pending criminal] case,' "[101] we must reject his position.

Second, Ehrlichman contends he was deprived of his Sixth Amendment right to counsel when the President permitted Ehrlichman, but not his attorney, to examine his notes. The fact that Ehrlichman was given access to these files—which recorded Presidential conversations apparently unrelated to the Fielding break-in—could not vest a right of access in his attorney, who was not privy to the conversations. The order did not prevent Ehrlich-

[99] *See United States* v. *Nixon*, 418 U.S. 683, 708 (1974); *Nixon* v. *Sirica*, 159 U.S. App. D.C. 58, 75, 487 F.2d 700, 717 (1973).

[100] See note 95 *supra*.

[101] *United States* v. *Nixon*, 418 U.S. at 713, quoting *United States* v. *Burr*, 29 F.Cas. 187, 190 (No. 14,694) (Va. 1807).

man from leaving the room where the files were located at any time to inform his attorney in detail of the materials he had located. Ehrlichman does not contend that his attorney would have been prevented from framing subpoenas *duces tecum* for relevant material so located. In sum, the District Court committed no error with respect to its handling of the discovery of Ehrlichman's notes.

The only evidence Ehrlichman specifically alleges to be exculpatory and wrongfully withheld is the so-called "Leaks" file. On 26 March 1973, a briefcase filled with files on the "Pentagon Papers" investigation, which had been in the possession of David Young, was delivered to Ehrlichman's office. Before that delivery, Young photocopied those documents which implicated Ehrlichman in the Fielding break-in. Young testified at trial that Ehrlichman later told him he had removed certain of the documents which were most incriminating before returning the files to Young, and that Young verified this fact when reviewing the files. Ehrlichman testified that he had not removed those memoranda. Eventually, the documents wound up in a file marked "Leaks," in a box marked "Ehrlichman," in the White House.

Ehrlichman contended at trial that production of the file was necessary to show he was involved in legitimate efforts to tighten security and prevent leaks within the government. The President's attorney, James St. Clair, indicated in a hearing on the matter that the file contained numerous classified documents not relating to Dr. Fielding or David Ellsberg. He indicated, however, that he thought the President would permit disclosure of specific documents from the file if such a request were made. Ehrlichman never submitted such a request nor showed why production of the entire file was necessary to his defense.

On appeal, however, for the first time Ehrlichman argues that production of the file *folder* was important to show that the designation "Leaks" on the folder was not in his handwriting and the file had been created by someone else.[102] Not only is this theory produced at much too late a date, but it is extremely doubtful that such evidence could have influenced the jury's verdict. We find therefore, that Ehrlichman has not shown sufficient actual prejudice to his case to justify reversal of his conviction for the District Court's refusal to order the production of the "Leaks" file.

C. *The Sufficiency of the District Court's Interrogatories to the President*

Ehrlichman's final argument is that the District Court erred in failing either to require then-President Nixon to appear as a witness at trial or answer detailed interrogatories propounded by the defendant. First, it would appear that if a subpoena *duces tecum* on a President may only be enforced where there is a "demonstrated, specific need" for the testimony or the testimony is "essential to the justice of the [pending criminal] case," [103] certainly a more burdensome subpoena *ad testificandum* would have to meet at least equal standards. Neither Ehrlichman nor any of his co-defendants, however, claims that the President specifically authorized the break-in. The Special Prosecutor disclaimed any evidence indicat-

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[102] He also argues that production of the original memoranda Young alleged Ehrlichman removed from Young's files would show that they had not been destroyed. The government itself at trial, however, produced evidence showing the incriminating documents were not destroyed but placed in files Ehrlichman maintained and controlled. The government's own case, then, confirmed the position Ehrlichman now alleges he needed the "Leaks" file to prove.

[103] *United States* v. *Nixon*, 418 U.S. at 683.

ing Presidential authorization, and the President himself denied even having had prior knowledge of the Fielding operation. In the absence of claim of direct Presidential involvement, and in view of the substitute procedure available to the defendant of propounding interrogatories, we find unpersuasive Ehrlichman's argument that President Nixon should have been compelled to appear as a witness.

Second, as to the detailed interrogatories submitted by Ehrlichman, we find, as did the District Court, that many of the questions were repetitive or irrelevant to the issues properly before the court. The court drafted concise questions addressed to the central issues of the Ehrlichman submission and the President answered these. Ehrlichman contends, however, that the court's interrogatories were inadequate to explore the issue whether concealment of the activities of the "Room 16" unit was undertaken pursuant to Presidential order, to protect highly classified information, or whether such concealment was intended instead to mask wrongdoing. Our comparison of the interrogatories submitted by the defendant and those formulated by the court on this issue lead us to reject this contention. It appears highly unlikely that the President's answers would have differed in any significant respect had Ehrlichman's submission been adopted. Moreover, the President's response to the court's interrogatories revealed that he would have had little useful testimony to give on the question of concealment—even assuming the relevance of that question to the issues at trial [104]—if he had been called to testify in person.[105]

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[104] See note 98, *supra*.

[105] President Nixon stated in response to court interrogatories number three and four:

> I do not have a precise recollection of instructions given to Mr. Ehrlichman with respect to any specific agencies. In substance, however, I do recall repeatedly emphasizing to Mr. Ehrlichman that this was a highly classified matter which could be discussed with others only on an absolutely "need to know" basis. I conveyed these instructions because I believed that the Unit could not function effectively if its existence or the nature and details of its work were compromised by disclosure. These instructions were given at various times after the Special Investigations Unit was formed, which was shortly after June 13, 1971.

Tr. 2305.

Conclusion

For the foregoing reasons, the District Court judgment is

Affirmed.

LEVENTHAL, *Circuit Judge, joined by Judge* MERHIGE, *District Judge, concurring*: This supplemental concurring opinion is not meant to derogate from Judge Wilkey's opinion for the court, in which I join, but is occasioned by the amicus curiae memorandum submitted by the Department of Justice. Because it is not necessary to pass on the contention tendered therein, the court's opinion prudentially avoids discussion of it. But an entirely proper and useful function of a concurring opinion is to identify matters that did not call for dispositive ruling. And since the Department's amicus memorandum seems to me to cut across the very protection the Fourth Amendment was designed most fundamentally to provide, I view my responsibility as a judge as calling on me to voice my concern.

Brief of Special Prosecutor

When I read the Brief for the United States filed on May 2, 1975, signed by Special Prosecutor Henry S. Ruth, Jr. and other members of the Watergate Special Prosecution Force, I was completely convinced—unless appellant's oral argument provided insights not foreshadowed in his brief—that it demolished appellant's contention that the break-in of Dr. Fielding's office was consistent with the Fourth Amendment. I was satisfied that it was entirely sound in its doctrine that a physical break-in to a home or office without a judicial warrant contravenes the Fourth Amendment, where as here the dark-of-night entry and search, planned weeks in advance, did not present "exigent circumstances" or any other of the "few specifically established and well-delineated exceptions" to the warrant requirement. See Katz v. United States, 389 U.S. 347, 357 (1967).[1]

[1] This was obviously not a search incident to arrest, nor a seizure of evidence in "plain view" of the police. The exception for exigent circumstances is developed in such cases as Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966); Carroll v. United States, 267 U.S. 132 (1925); Dorman v. United States, 140 U.S.App.D.C. 313, 435 F.2d 385 (en banc, 1970).

In the Brief for the United States the Special Prosecutor relies on "200 years of precedent interpreting and shaping the Fourth Amendment" as establishing that a warrant must be obtained in all cases for the physical search of a citizen's home or office, citing such cases as Wolf v. Colorado, 338 U.S. 25 (1949)[2] (warrantless and unconsented entry into a doctor's offices for the purpose of rummaging through his files), Johnson v. United States, 333 U.S. 10, 13-14 (1948), Silverman v. United States, 365 U.S. 505, 511 (1961). He sees no reason to depart from that rule on national security grounds. Indeed the cases motivating adoption of the Fourth Amendment struck down governmental claims of unregulated power to search for evidence of treason and sedition.[3]

[2] Overruled on other grounds in Mapp v. Ohio, 367 U.S. 643 (1961).

[3] The Framers formulated the Fourth Amendment against the background of Entick v. Carrington, 95 Eng. Rep. 807 (1765), a case found by the Supreme Court in Boyd v. United States, 116 U.S. 616, 627 (1886) to be "sufficiently explanatory of what was meant by unreasonable searches and seizures." *Entick* upheld damages against the Secretary of State, who issued a general executive warrant to seize papers in a case of seditious libel. In a 1761 debate that helped inaugurate opposition to Great Britain, James Otis denounced the similar practice of using writs of assistance to empower revenue officers to search on their discretion for smuggled goods as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book" since they placed the "liberty of every man in the hands of every petty officer." Quoted in Boyd v. United States, 119 U.S. at 625.

Undertaking a search without a warrant on the "belief, however well founded, that an article sought is concealed in a dwelling house," Agnello v. United States, 269 U.S. 20, 33 (1925) has consistently and repeatedly been condemned as inconsistent with the Fourth Amendment's requirements. *See,*

No American case since has sustained the right to search a home or office without a warrant merely in the name of national security. Although the precise issue at stake here has not previously been raised, those cases dealing with espionage prosecutions, where the national security implications were evident, refused to tolerate any deviation from standard Fourth Amendment requirements.[4] In expanding the basic protections of the Fourth Amendment, the wiretap cases have not simultaneously eroded the Fourth Amendment's general protections already clearly in existence.

Amicus Curiae Memorandum

On May 30, 1975, a few weeks before the date set for oral argument, there was filed in this court a two-page Memorandum for the United States as Amicus Curiae, signed by John C. Keeney, Acting Assistant Attorney General. It set forth that it was submitted pursuant to Rule 29, Fed. Rules of Appellate Procedure, and "states the views of the United States" concerning the issue of the legality of forms of surveillance in the United States in cases involving foreign espionage or intelligence. The view thus set forth is this, that a warrantless search is

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e.g., Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); Johnson v. United States, 333 U.S. 10, 14 (1948).

[4] *See*, United States v. Coplon, 185 F.2d 629, 635 (2d Cir. 1950) (warrantless arrest of Justice Department employee apparently engaged in passing defense information to a Soviet agent held inconsistent with statutory requirements; no consideration was given any national security justification for such an arrest; Abel v. United States, 362 U.S. 217 (1960) (valid search incident to a deportation arrest upheld which produced evidence of espionage activities; the Court nevertheless noted that "the preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States.") at 226.

lawful under the Fourth Amendment provided there is "solid reason to believe that foreign espionage or intelligence is involved," intrusion into any zone of expected privacy is "kept to the minimum" and there is "personal authorization by the President or the Attorney General." As to searches governed by such conditions, the Memorandum puts it there is no constitutional difference between searches conducted by wiretapping and those involving physical entries into private premises. The Memorandum concludes its presentation of "the position of the Department of Justice":

> It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified under the proper circumstances when related to foreign espionage or intelligence (see U.S. Brief p. 45, n. 39).

That footnote 39 of the earlier-filed United States Brief, signed by Mr. Ruth, reads as follows:

> "Attorneys General in certain circumstances have permitted warrantless foreign intelligence surveillance involving a technical trespass solely for the purpose of placing a bug.

The Resulting Problem

The facts of this case required a rejection of appellant's contention whether the court accepted the position set forth in the Brief for the United States or the position set forth in the Memorandum for the United States as Amicus Curiae. Because none of the defendants in this action claimed or offered to prove that either the President or the Attorney General specifically authorized the break-in, it was unnecessary for us to decide whether or not a physical break-in and search undertaken for foreign security reasons on the specific authority of the President or Attorney General would meet the requirements of the Fourth Amendment. Without such authori-

zation, no possible claim of the validity of undertaking such a search could be maintained.

What troubles me about the application of conventional judicial approach, calling for decision on narrowest grounds available, is that regardless of what the judges say, their action in failing to reject the contention in the Justice Department Memorandum may be taken to signify that it has substance.

It troubles me particularly because the position is asserted by the Department of Justice, the law department of the Executive Branch, and has reverberations. That kind of assertion of an exception to settled doctrine may lead to an assumption by highly placed officials that the settled doctrine is now "eroded."[5]

The very assertion of the exception by the Department of Justice accomplishes some diminution of the sense of privacy of all. While the Memorandum posits as a condition that there must be "solid reason" to believe foreign espionage or intelligence is involved, that determination requires judgment and discretion. The *Keith* opinion identifies the problem when there is executive discretion without review—stating that "unreviewed executive discretion may yield too readily to pressures" and "those

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[5] *See* Hearings before the Select Committee on Presidential Campaign Activities of the United States Senate, 93d Cong., 1st Sess. Book 6 (testimony of July 25, 1973) p. 2601:

> Senator Talmadge: Do you remember when we were in law school, we studied a famous principle of law that came from England and also is well known in this country, that no matter how humble a man's cottage is, that even the King of England cannot enter without his consent.
>
> Mr. Ehrlichman: I am afraid that has been considerably eroded over the years, has it not?
>
> Senator Talmadge: Down in my country we still think it is a pretty legitimate principle of law.

[Continued]

charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." United States v. United States District Court, 407 U.S. 297, 317 (1972). Citizens whose views are in opposition to the Administration's may be pursued on the ground of some relation to foreign intelligence, although that is not in fact the case. Indeed, in this case it was admitted that Dr. Fielding, whose office was broken into, had no relation whatever to foreign intelligence, and although that was speculated as a possibility as to Dr. Ellsberg, no information linking Dr. Ellsberg to foreign intelligence has yet been disclosed.

The problem is deepened by the reality that any executive action on the basis of the asserted exception will be unknown. The mere impairment of a general sense of privacy apparently would not confer standing to challenge unknown actions. Laird v. Tatum, 408 U.S. 1 (1972). Yet when executive authority is not only asserted but acted upon, that somehow seems to lead to an argument based on practice. Indeed, the Memorandum Amicus Curiae seeks to build on the fact that in certain instances the Attorney General has authorized a technical trespass to place a bug, as noted in the United States

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[5] [Continued]

Senator Talmadge's words recall the historic declamation by William Pitt, first Earl of Chatham, distinguished also for denouncing the American policy of George III, in his address to the House of Lords:

> "The poorest man may in his cottage bid defiance to the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!—all his force dares not cross the threshold of the ruined tenement!"

(Quoted in I. BROUGHAM, STATESMEN IN THE TIME OF GEORGE III. 52 (1839).)

Brief, translating this into a long-settled view that there is authority for "physical entries into private premises"[6] without taking any note of the position of the United States Brief, that technical trespasses to conduct electronic surveillance stand in a different position from entries to conduct physical seizures or visual searches of papers, and that the two types of intrusion have had distinctively different conceptual approaches and legal histories.[7]

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[6] The United States Brief notes, however, that the United States did not defend this proposition when presented with the opportunity in United States v. Butenko, 494 F.2d 593 (3d Cir.), *cert. denied sub nom* Ivanov v. United States, 419 U.S. 881 (1974), by failing to resist disclosure of trespassory surveillance logs.

[7] In holding the Fourth Amendment applicable only to searches "of material things" (at 464) and not to electronic surveillance, the 1928 Olmstead case emphasized that the wiretaps were made "without trespass upon any property of the defendants." Olmstead v. United States, 277 U.S. 438, 457 (1928), *Overld* in Katz v. United States, 389 U.S. 347 (1967) It had already been established in Gouled v. United States, 255 U.S. 298 (1921) (disapproved in part in Warden v. Hayden, 387 U.S. 294 (1967) that a search by stealth of a citizen's private quarters is an unreasonable search. In Silverman v. United States, 365 U.S. 505, issued March 6, 1961, the Court ruled (at 509-10) that "eavesdropping . . . by means of an unauthorized physical penetration into the premises occupied by the petitioners" was "beyond the pale" of prior decisions of a divided Court holding that "eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights."

Although the *Olmstead* decision put warrantless nontrespassory electronic surveillance outside the scope of the Fourth Amendment, the Court's *Nardone* decisions of 1937 and 1939 construed the Federal "wiretap" statute as prohibiting the intercept and disclosure of wiretap-garnered information by Executive officials, even in court, as "inconsistent with ethical standards and destructive of personal liberty." Nardone v. United States, 308 U.S. 338, 340 (1939), Nardone v. United

The Amicus brief in effect seeks to rewrite history by saying that the Department of Justice has always sanctioned trespasses, and seeks to finesse the distinc-

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States, 302 U.S. 379, 383 (1937). The Attorney General had construed the statute as permitting intercept in the absence of disclosure.

It was against this background of statutory rather than constitutional prohibition of warrantless surveillance that the national security exception for wiretapping was first invoked. In 1940 President Roosevelt authorized the Attorney General to secure information by listening devices of conversations of persons suspected of subversive activities against the United States Government. That outstanding directive was continued by President Truman in 1946. In 1965 President Johnson issued a directive that the interception of telephone communications "should be engaged in only where national security is at stake;" and approval of the Attorney General is obtained. As Acting Attorney General Ramsey Clark extended that directive to all "listening devices in private areas." The prohibition put on such electronic interceptions thus respected statutory and voluntary limits on surveillance even though the Fourth Amendment under *Olmstead* did not require such restraint. (Cited memoranda collected at 514 F.2d at 246-48).

After the Supreme Court decided *Katz* in 1967, and held the Fourth Amendment applicable to electronic surveillance, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, requiring and providing for judicial authorizations of such surveillance. 18 U.S.C. § 2511(3) provided that nothing in the original wiretap law (§ 605 of the Communications Act of 1934, 47 U.S.C. § 605) or this Act "shall limit the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities." When *Katz* was decided by the Supreme Court in 1967, one Justice (White) indicated that the Fourth Amendment was not applicable if the President or the Attorney General had determined that electronic surveillance was necessary to protect the security of the Nation. (389 U.S. at 363-64). Two Justices disagreed and denied that this could dispense with a warrant, (see Douglas and Brennan, J.J. at pp. 359-60) The other Justices declined to rule on that issue, *see* 389 U.S. 358, foot-

tion between technical trespass for electronic surveillance and the kind of breaking and entering that was for hundreds of years labelled a core violation of fundamental rights. That the "long-settled" position of the Department marked a crucial distinction between the two trespasses is confirmed by the recent report of a Senate Select Committee which found: "There is no indication that any Attorney General was informed of FBI 'black bag jobs', and a 'Do Not File' procedure was designed to preclude outside discovery of the FBI's use of the technique." [8]

As appears from the history reviewed in the margin (footnote 7), in the days after *Olmstead* (1928) and before *Katz* (1967), there were Presidential directives—in 1940, 1946, and 1965—permitting the Attorney General to secure information by intercept of telephone communications in the interest of national security. While these plainly permitted phone taps implemented off the suspect's premises, they did not specifically authorize physical trespass, and the 1961 *Silverman* opinion held that even though there was no general Fourth Amendment ban on warrantless wiretaps, there was a ban on warrantless electronic eavesdropping gained by "unauthorized physical penetration into the premises."

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note 23, and Stewart, J. in Giordano v. United States, 394 U.S. 310, at 315 (1969). Two circuit courts subsequently upheld as valid warrantless electronic surveillance, in instances where the surveillances had been expressly approved by the Attorney General. United States v. Butenko, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied, sub nom.* Ivanov v. United States, 419 U.S. 881 (1974). (Attorney General approval, set forth in 318 F. Supp. 66, 70-71 (D.C.N.J. 1970). United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974).

[8] S.Rep. No. 94-755, 94th Cong., 2d Sess., Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, Vol. II (1976) p. 61.

There may well be a critical difference between electronic surveillance and physical entries for the purpose of search and seizure of papers, and a two-page ipse dixit statement of views in the Memorandum does not suffice to lead me to question the presentation in the United States Brief. While history is not determinative, physical entry into the home was the "chief evil" appreciated by the framers of the Constitution. United States v. United States District Court, 407 U.S. 297, 313 (1972). This argues strongly for the proposition that the safeguard against this chief evil is not to be whittled away on abstract grounds of symmetry, merely because the new evil of electronic surveillance was possibly subject to a national security exception when, in 1967, it came to be regulated by constitutional doctrine.

The analysis in *Keith* makes it clear that the importance of the interest protected has bearing on the permissibility of warrantless intrusions.[9] In testimony before the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, November 6, 1975, Attorney General Levi has also recognized that "[t]he nature of the search and seizure can be very important. An entry into a house to search its interior may be viewed as more serious than the overhearing of a certain type of conversation. The risk of abuse may loom larger in one case than the other." (p. 32). He also notes that the warrant requirement depends on both "the purpose and degree of intrusion." (p. 46). The At-

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[9] Electronic surveillance in terms of instrusiveness, notice, utility and methodology, differs fundamentally from more traditional searches, and the Supreme Court has dealt separately with the problems it poses. White's opinion in *Katz* only refers to electronic surveillance as permissible without a warrant under a national security exception. And the Court's consideration in *Keith* of the claim of a domestic security exception focused on the special features of electronic surveillance instead of reasoning from the physical search cases.

torney General apparently contends that a high purpose of the intrusion outweighs from a constitutional standpoint the physical act of intrusion itself. Yet the Attorney General recognizes that the nature of the intrusion may outweigh the purpose, and that a judicial warrant is a precondition before there can be an intrusion on a citizen who is not suspected of any foreign link against the United States. This he identifies as being the exact ruling of Zweibon v. Mitchell, —— U.S.App.D.C. ——, 516 F.2d 594 (1975, en banc).

Even if it be assumed that the Supreme Court will take a step so far declared only by Justice White, and hold warrantless electronic surveillance justified in the case of foreign intelligence activities, that step may be responsive to an assertion that practical realities require a continuous and protracted electronic surveillance, of certain foreign representatives or agents, that does not lend itself to the warrant procedure.[10] Any claim of authorization to make physical entries, however, would project a more discrete kind of intrusion, without the same claim to a need for avoiding a warrant procedure. The Attorney General's testimony makes this kind of distinction in the electronic surveillance context, noting that "the more limited in time and target a surveillance is, the more nearly analogous it appears to be with a

[10] Attorney General Levi, in his November 6, 1975, testimony before the Senate Select Committee to Study Governmental Operations with respect ot Intelligence Activities, drew a distinction in terms of the significance and value of a judicial warrant among three categories of electronic surveillances undertaken to protect national security: surveillance to protect against specific anticipated criminal offenses of a particular foreign agent; a more extended or continuous surveillance directed at an identified foreign agent to monitor his activities, contacts and to gain knowledge about his country; virtually continuous surveillance without specifically predetermined targets for the gathering of foreign intelligence information.

traditional criminal search which involves a particular target location or individual at a specific time," and thus apparently the more "amenable to some sort of warrant requirement."[11] And Justice Powell's opinion in *Keith* certainly rejects lesser contentions against a judicial warrant, that judicial machinery cannot be trusted with secrets, and with the ability to handle the differences between security issues and the probable cause of past criminality normally considered by judges.

The foreign security rationale of the Justice Department's amicus memorandum would apply even if there were no "exigent circumstances" that would justify use of the emergency exception. That rationale lacks any principle of self-containment. The basic premise of stated Fourth Amendment law—that in the absence of exigent circumstances a physical search is per se unreasonable without a judicial warrant—is thus to be sacrificed on the altar of security, and this in the context of a physical search of a person who was not believed to be a traitor but was merely a repository of information on the personality of a patient, who in turn was deemed involved in our nation's foreign security.[12]

One is hard put to know how to cope with the assertion in the Amicus Curiae Memorandum that it "has long been" the position of the Department of Justice that warrantless physical entries are justified "under the proper circumstances when related to foreign espionage or intelligence." Was this position disclosed? In what respect does a practice that is not disclosed reflect a "position" of legality? It has recently developed that the FBI has in the past *secretly* made physical entries for the purpose of "black bag" jobs. It could fairly be put that the secrecy at the time was a recognition of the *illegality* of

[11] *Id.* at p. 50 (mimeo).

[12] *See, e.g.*, Zweibon v. Mitchell, *supra*, 516 F.2d at 652-53.

the practice.[13] We have no indication that any Attorney General was informed of these (*see* text at note 8, *supra*). We are certainly not told the nature of the "proper circumstances" in which any Attorney General allowed physical entries "when related to foreign espionage or intelligence." Was this after the 1961 *Silverman* case? Was the invasion of premises of foreign governments (where it may be argued the Fourth Amendment offers no protection)? Or of foreign agents of foreign governments?

Justice Powell's concern over unreviewed executive discretion is not squarely met by the Justice Department's position that the search here would stand on different ground if authorized by former Attorney General Mitchell. Justice Powell warned that the availability of a doctrine permitting unreviewed executive discretion to conduct surveillance in the name of security provides temptation to abuse rights, and he cited Chief Justice Warren's caution in United States v. Robel, 389 U.S. 258, 264 (1967):[14]

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[13] The Senate Select Committee similarly explains the practice of secrecy:

> The only internal FBI memorandum found discussing the policy for surreptitious entries confirms that this was the procedure and states that "we do not obtain authorization from outside the Bureau" because the technique was "clearly illegal." The memorandum indicates that "black bag jobs" were used not only "in the espionage field" but also against "subversive elements" not directly connected to espionage activity. It added that the techniques resulted "on numerous occasions" in obtaining the "highly secret and closely guarded" membership and mailing lists of "subversive" groups.

S.Rep. No. 74-755, 94th Cong., 2d Sess., Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, Vol. II (1976), p. 62.

[14] United States v. U.S. District Court, supra, 407 U.S. at 332.

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

The long and short of it is that the Amicus Memorandum seeks to use Katz v. United States, 389 U.S. 347 (1967), which expanded Fourth Amendment protection to the field of electronic surveillance, as a means of contracting Fourth Amendment protection outside the electronic surveillance domain. In *Katz* the Court "refused to lock the Fourth Amendment into instances of actual physical trespass."[15] *Katz* and *Keith* were intended to open, not lock, the protection of the Fourth Amendment.

Without purporting to provide a binding ruling on the matter—for it affects the liability of neither Ehrlichman nor his codefendants—I thus record this reaction to the legal arguments presented in this case. The federal courts should not tinker with the Supreme Court's presently announced doctrine, requiring a warrant for physical entries except in exigent circumstances, unless and until the Supreme Court says so. Neither the Executive's hitherto undisclosed past conduct nor its present Amicus claim justifies expansion of the exigency exception.

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[15] United States v. U.S. District Court, supra, 407 U.S. at 313.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1882

September Term, 1975
Filed May 17, 1976

United States of America

v.

Criminal 74-116

John D. Ehrlichman,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: LEVENTHAL and WILKEY, Circuit Judges and MERHIGE,* United States District Judge for the Eastern District of Virginia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
/s/ George A. Fisher
George A. Fisher
Clerk

Date: May 17, 1976
Opinion for the Court filed by Circuit Judge Wilkey.
Concurring opinion filed by Circuit Judge Leventhal.
*Sitting by designation pursuant to 28 U.S.C. § 292(d)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1882

September Term, 1975
Filed August 16, 1976

United States of America

Criminal 74-116

v.

John D. Ehrlichman,
Appellant

Before: Leventhal and Wilkey, Circuit Judges; Merhige*, U.S. District Judge for the Eastern District of Virginia.

ORDER

On consideration of the petition for rehearing filed by appellant Ehrlichman, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam
For the Court:

/s/ George A. Fisher
George A. Fisher
Clerk

*Sitting by designation pursuant to Title 28 U.S. Code Section 292(d).

APPENDIX D

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of

such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means–,

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As amended Pub.L. 91-452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

APPENDIX E

Federal Rules of Criminal Procedure

Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is

within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of

statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

(4) Failure to Call Witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to

introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) **Information Not Subject to Disclosure.** Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(3) **Failure to Call Witness.** The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.

(c) **Continuing Duty to Disclose.** If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

(d) **Regulation of Discovery.**

(1) **Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If

the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) **Failure to Comply with a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) **Alibi Witnesses.** Discovery of alibi witnesses is governed by Rule 12.1

As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(20)-(28), 89 Stat. 374, 375.

APPENDIX F

Federal Rules of Criminal Procedure

Rule 17. Subpoena

(a) For Attendance of Witnesses; Form; Issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a United States magistrate in a proceeding before him, but it need not be under the seal of the court.

(b) Defendants Unable to Pay. The court shall order at any time that a subpoena be issued for service on a named witness upon an *ex parte* application of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or

objects designated in the sbupoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered to the witness upon service of a subpoena issued in behalf of the United States or an officer or agency thereof.

(e) Place of Service.

(1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C., § 1783.

(f) For Taking Deposition; Place of Examination.

(1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) Place. The witness whose deposition is to be taken may be required by subpoena to attend at any

place designated by the trial court, taking into account the convenience of the witness and the parties.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a United States magistrate.

As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(29), 89 Stat. 375.

APPENDIX G

NOTE: The synopsis prepared by the Reporter is printed herewith, preceding the opinion, as a convenience for readers, and is not part of the opinion.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1883

UNITED STATES OF AMERICA

v.

BERNARD L. BARKER, APPELLANT

No. 74-1884

UNITED STATES OF AMERICA

v.

EUGENIO R. MARTINEZ, APPELLANT

Argued 18 June 1975

Decided 17 May 1976

Appellants Bernard L. Barker and Eugenio R. Martinez were convicted by a jury of the United States Dis-

trict Court for the District of Columbia of conspiracy to violate the civil rights of Dr. Louis J. Fielding, in violation of 18 U.S.C. § 241. Appellants were members of the "Special Investigations" unit which burglarized Dr. Fielding's office in search of records on his patient, Daniel Ellsberg. The convictions were appealed to the United States Court of Appeals, where argument was heard in conjunction with the companion appeals of John D. Ehrlichman and G. Gordon Liddy. In opinions by Judges Wilkey and Merhige, to which Judge Leventhal dissents in part, the convictions of Barker and Martinez are reversed.

The opinions by the majority deal with two substantial points raised on appeal. First, Appellants argue that the conviction under 18 U.S.C. § 241 must be reversed because the specific intent requirement of that statute has not been met. Barker and Martinez assert that the requisite specific intent is present only where the conspirators' *predominant* purpose is an act in violation of civil rights, and thus that it is lacking in this case where the primary objective was the inspection of Ellsberg's records rather than the burglary of Dr. Fielding's office. Citing *Anderson v. United States*, 417 U.S. 211 (1974), the court unanimously rejects this argument on the basis that specific intent is present whether actions violating federal civil rights are a predominant or incidental objective of the conspiracy. (Wilkey op. at 7-8, Merhige op. at 1, Leventhal op. at 27-30).

Second, Appellants challenge their convictions on the ground that the District Court's evidentiary rulings and jury instructions denied them the opportunity to prove a defense of good faith reliance on apparent authority. More specifically, Barker and Martinez complain: (1) that evidence was excluded as to the reasonableness of their belief in the authority of E. Howard Hunt, their White House superior, to order such an operation; and

(2) that the District Court rejected a proposed jury instruction allowing a defense for reasonable, good faith reliance on apparent authority, and instructed instead that absent belief that a valid warrant had been obtained, any mistake as to the legality of the operation was no defense.

Judges Wilkey and Merhige conclude that the District Court erred in rejecting the possibility of a limited mistake of law defense. While both recognize the general rule that a mistake of law is no defense, they conclude that the District Court's refusal to recognize an exception to that doctrine possibly applicable to this case requires reversal of the convictions.

Judge Wilkey states that Appellants might have been able to bring themselves within an exception to the mistake of law doctrine relating to assistance of a governmental official in the performance of a governmental function. In order to establish such a defense they would have to prove (1) facts justifying their reasonable reliance on Hunt's apparent authority and (2) a plausible legal theory under which Hunt could in fact have such authority. He concludes that the facts justifying reliance might have been proven had the court admitted the evidence offered by Appellants, and that a plausible legal theory supporting such a defense is presented by the longstanding Justice Department view that the President may authorize warrantless searches related to foreign espionage or intelligence. (Wilkey op. at 15-24)

Judge Merhige finds possibly applicable to Appellants an exception to the mistake of law rule for reasonable reliance upon official interpretations of the law. He states that the jury could have concluded that Assistant to the President, John Ehrlichman, had expressed or implied that the break-in was legal under a national security rationale, and that this view was relayed to Appellants by Hunt. Further, in view of the substantial

power of the Executive Branch in the field of foreign affairs, a jury could further find that Appellants acted reasonably in relying on this interpretation of the law. (Merhige op. at 2-8)

The convictions are accordingly REVERSED.

Judge Leventhal dissents on the ground that Appellants have failed to allege facts which might bring them within any established exception to the doctrine that a mistake of law is no defense.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1883

UNITED STATES OF AMERICA

v.

BERNARD L. BARKER, APPELLANT

No. 74-1884

UNITED STATES OF AMERICA

v.

EUGENIO R. MARTINEZ, APPELLANT

Appeals from the United States District Court for the District of Columbia

(D.C. Criminal 74-116)

Argued 18 June 1975

Decided 17 May 1976

Daniel E. Shultz (appointed by this Court), for appellants in Nos. 74-1883 and 74-1884.

Philip B. Heyman, Special Assistant to the Special Prosecutor, with whom *Henry S. Ruth, Jr.*, Special Prosecutor, *Peter M. Kreindler*, Counsel to the Special Prosecutor, *Maureen E. Gevlin* and *Richard D. Weinberg*, Assistant Special Prosecutors, were on the brief for appellee. *Leon Jaworski*, Special Prosecutor at the time the record was filed, entered an appearance as Special Prosecutor.

Ivan Michael Schaeffer, Attorney, Department of Justice, filed a memorandum on behalf of the United States of America as *amicus curiae*.

Before: LEVENTHAL and WILKEY, *Circuit Judges* and MERHIGE,* *United States District Judge* for the Eastern District of Virginia

Opinion *Per Curiam*.

Circuit Judge WILKEY and *District Judge* MERHIGE filed opinions reversing the judgment of the District Court.

Dissenting Opinion filed by *Circuit Judge* LEVENTHAL.

PER CURIAM: The mandate of the court is that the Judgment of the District Court is reversed and the case is remanded for a new trial. Judges Wilkey and Merhige have filed separate opinions. Judge Leventhal dissents.

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* Sitting by designation pursuant to 28 U.S.C. § 292(d).

WILKEY, *Circuit Judge*: Two of the "footsoldiers" of the Watergate affair, Bernard Barker and Eugenio Martinez, are with us again. They haven't been promoted, they are still footsoldiers. They come before us this time to challenge their convictions under 18 U.S.C. § 241, for their parts in the 1971 burglary of the office of Dr. Louis J. Fielding.

I. FACTS

During the summer of 1971, following the publication of the now famous "Pentagon Papers," a decision was made to establish a unit within the White House to investigate leaks of classified information. This "Room 16" unit, composed of Egil Krogh, David Young, G. Gordon Liddy, and E. Howard Hunt—and under the general supervision of John Ehrlichman—determined, or was instructed, to obtain all possible information on Daniel Ellsberg, the source of the Pentagon Papers leak.[1] After Ellsberg's psychiatrist, Dr. Fielding, refused to be interviewed by FBI agents, the unit decided to obtain copies of Ellsberg's medical records through a covert operation.

Hunt had been a career agent in the CIA before his employment by the White House. One of his assignments was as a supervising agent for the CIA in connection with the Bay of Pigs invasion, and, as "Eduardo," he was well known and respected in Miami's Cuban-American community. A fact destined to be of considerable importance later, he had been Bernard Barker's immediate supervisor in that operation. When the "Room 16" unit determined that it would be best if the actual entry into Dr. Feilding's office were made by individuals not in the employ of the White House, Hunt recommended enlisting the assistance of some of his former associates in Miami.

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[1] A more detailed discussion of the organization and purpose of the "Room 16" unit is in our opinion in *United States v. Ehrlichman*, No. 74-1882, at pp. 3-4.

Hunt had previously reestablished contact with Barker in Miami in late April 1971, and he met Martinez at the same time. He gave Barker an unlisted White House number where he could be reached by phone and wrote to Barker on White House stationery. On one occasion Barker met with Hunt in the Executive Office Building. By August 1971 Hunt returned to Miami and informed Barker that he was working for an organization at the White House level with greater jurisdiction than the FBI and the CIA. He asked Barker if he would become "operational" again and help conduct a surreptitious entry to obtain national security information on "a traitor to this country who was passing . . . classified information to the Soviet Embassy." He stated further that "the man in question . . . was being considered as a possible Soviet agent himself."

Barker agreed to take part in the operation and to recruit two additional people. He contacted Martinez and Felipe deDiego. Barker conveyed to Martinez the same information Hunt had given him, and Martinez agreed to participate. Like Barker, Martinez had begun working as a covert agent for the CIA after Castro came to power in Cuba. Although Barker's formal relationship with the CIA had ended in 1966, Martinez was still on CIA retainer when he was contacted.

Both testified at trial that they had no reason to question Hunt's credentials. He clearly worked for the White House and had a well known background with the CIA. During the entire time they worked for the CIA, neither Barker nor Martinez was ever shown any credentials by their superiors. Not once did they receive written instructions to engage in the operations they were ordered to perform. Nevertheless, they testified, their understanding was always that those operations had been authorized by the Government of the United States. That they did not receive more detail on the purpose of the Fielding operation or its target was not surprising to

them; Hunt's instructions and actions were in complete accord with what their previous experience had taught them to expect. They were trained agents, accustomed to rely on the discretion of their superiors and to operate entirely on a "need-to-know" basis.

On 2 September 1971 Hunt and Liddy met Barker, Martinez, and deDiego at a hotel in Beverly Hills, California. Hunt informed the defendants that they were to enter an office, search for a particular file, photograph it, and replace it. The following day the group met again. Hunt showed Barker and Martinez identification papers and disguises he had obtained from the CIA. That evening the defendants entered Dr. Fielding's office. Contrary to plan, it was necessary for them to use force to effect the break-in. As instructed in this event, the defendants spilled pills on the floor to make it appear the break-in had been a search for drugs. No file with the name Ellsberg was found.

The next day Barker and Martinez returned to Miami. The only funds they received from Hunt in connection with the entry of Dr. Fielding's office were reimbursement for their living expenses, the costs of travel, and $100.00 for lost income.

On 7 March 1974 the defendants were indicted under 18 U.S.C. § 241, along with Ehrlichman, Liddy, and deDiego for conspiring to violate the Fourth Amendment rights of Dr. Fielding by unlawfully entering and searching his office. On 7 May 1974 the defendants filed a Motion for Discovery and Inspection with an accompanying memorandum outlining, *inter alia*, their proposed defense of absence of *mens rea* due to a mistake of fact mixed with law attributable to their reasonable reliance on apparent authority.[2] On 24 May 1974, in a memorandum order, the District Court rejected the defendants'

[2] Barker Appendix at 55.

position, on the ground that "a mistake of law is no defense." [3]

On 12 July 1974 the jury returned verdicts of guilty against both Barker and Martinez.

II. Legal Issues

The court's determination at the outset that a mistake of law could not excuse defendants' conduct led to two important legal errors which require reversal of the Barker and Martinez convictions.

First, the defendants were prevented during the trial from offering complete evidence as to the reasonableness of their belief in Hunt's authority to engage them in the Fielding operation.[4]

Second, at the end of the trial, the District Court rejected the defendants' proposed instructions setting forth their theory of the case.[5] The jury was advised that to convict they need find only that the purpose of the break-in was to enter and search Dr. Fielding's office without a warrant or his permission, and for governmental rather than purely private purposes; a mistake as to the legality of such an operation was no defense.[6]

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[3] *United States* v. *Ehrlichman*, 376 F. Supp. 29, 35 (D.D.C. 1974).

[4] *See generally* Offer of Proof, Barker Appendix at 86.

[5] Barker Appendix at 104-05.

[6] Tr. 2525-26:

> In order to establish the requisite intent the Prosecutor must show that the object of the conspiracy and the purpose of each defendant was to carry out a warrantless entry into and search of Dr. Fielding's office without permission.
>
> In determining whether or not each defendant had the requisite intent, you should keep in mind that a mistake of fact may constitute a defense to the conspiracy charge but a mistake of law is not a defense.
>
> Thus, if one of the defendants honestly believed that a valid warrant had been obtained, such a mistake of fact would render him innocent of the alleged conspiracy because it cannot be said that he intended to conduct a warrantless search.
>
> On the other hand, if the defendant was fully aware of the relevant facts—that the search lacked both warrant and Dr. Fielding's permission, but erroneously believed that the search was still legal, that would constitute a mistake of law and a mistake of law is no excuse.
>
> In other words, an individual cannot escape the criminal law simply because he sincerely but incorrectly believes that his acts are justified in the name of patriotism, or national security, or a need to create an unfavorable press image, or that his superiors had the authority without a warrant to suspend the Constitutional proctections of the Fourth Amendment.

Barker and Martinez raise two arguments to sustain their position that they lacked the *mens rea* required for a conviction under section 241. The first is that their reasonable reliance on Hunt's authority—their "mistake of fact mixed with law"—negated the element of intent which is common to most serious criminal offenses, including conspiracy. It is this claim which requires reversal. Had the law as it stood in 1971 been correctly appraised by the trial judge, a more ample scope of proof and different jury instructions would have been granted appellants, all as discussed in Part IV, *infra*. The second argument is based upon the particular element of "specific intent" contained in section 241. While the court's opinion in *Ehrlichman* analyzes this second argument in detail,[7] a summary here may be helpful to distinguish the two arguments.

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[7] *United States* v. *Ehrlichman*, No. 74-1822, at pp. 9-22.

III. The "Specific Intent" Requirement of 18 U.S.C. § 241

It is settled law that a conviction under this section requires proof that the offender acted with a "specific intent" to interfere with the federal rights in question.[8] This does not mean that he must have acted with the subjective awareness that his action was unlawful. It is enough that he intentionally performed acts which, under the circumstances of the case, would have been clearly in violation of federal law, absent any other defense.

In the instant case, the District Court instructed the jury that a conviction was appropriate under section 241 if they found that the defendants conspired to enter and search Dr. Fielding's office, for governmental rather than personal reasons, without a warrant and without Dr. Fielding's permission. Barker and Martinez argue, however, citing *United States* v. *Guest*,[9] that the court erred in failing to advise the jury that a conviction was only possible if they further found that an unauthorized search of Dr. Fielding's office was the *predominant*, as opposed to incidental, purpose of the conspiracy. They conclude that such a test could not be met here, since their primary objective was the inspection of Ellsberg's records, not the burglary of Dr. Fielding's office.

Admittedly, the Supreme Court's brief discussion in *Guest* of the "specific intent" requirement is susceptible of the interpretation the defendants would place upon it. The Court did use the words "predominant purpose" to characterize the kind of intent to interfere with the right of interstate travel which could trigger the application of section 241.[10] That such an interpretation of the "specific intent" requirement is incorrect, however, was made quite clear by the Supreme Court in its most recent major decision on the requirements of section 241, *Anderson* v. *United States*.[11] In that case, the primary objective of the conspiracy was to influence a local election by casting false votes. As an incidental matter, false votes were cast for candidates for federal office as well. The Court concluded that "specific intent" had been adequately proven:

> A single conspiracy may have several purposes but if one of them—whether primary or secondary—be the violation of federal law, the conspiracy is unlawful under federal law.[12]

Moreover, the Court emphasized, there was no requirement under section 241 that the defendants have entertained the purpose of changing the outcome of the federal election. It was enough that they intended to cast false votes for candidates for federal office and thereby dilute the voting power of their fellow citizens.[13]

Thus, under *Anderson*, even if the defendants had as their primary objective the photographing of Daniel Ells-

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[8] *See, e.g., United States* v. *Guest*, 383 U.S. 745, 753-54 (1966).

[9] 383 U.S. 745 (1966).

[10] A specific intent to interfere with a federal right must be proved, and at trial the defendants are entitled to a jury instruction phrased in those terms. Thus for example, a conspiracy to rob an interstate traveler would not, of itself, violate § 241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel or to oppress a person because of his exercise of that right, then, . . . the conspiracy becomes a proper object of the federal law under which the indictment in this case was brought.

Id. at 760.

[11] 417 U.S. 211 (1974).

[12] *Id.* at 226.

[13] *Id.*

berg's medical file, so long as one of the purposes of the entry was to search Dr. Fielding's office without a warrant or his consent, the "specific intent" requirements of section 241 were met. Like that of Ehrlichman, the appeal of Barker and Martinez on this ground alone would falter.

IV. The Defense of Good Faith, Reasonable Reliance on Apparent Authority

A.

The primary ground upon which defendants Barker and Martinez rest their appeal is the refusal of the District Court to allow them a defense based upon their good faith, reasonable reliance on Hunt's apparent authority. They characterize this defense as a mistake of fact "coupled with" a mistake of law which negated the *mens rea* required for a violation of section 241. "The mistake of fact was the belief that Hunt was a duly authorized government agent; the mistake of law was that Hunt possessed the legal prerequisites to conduct a search—either probable cause or a warrant." [14]

It is a fundamental tenet of criminal law that an honest mistake of fact negatives criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be.[15] A mistake of law, on the other

[14] Barker Br. at 31-32.

[15] 1 Wharton's Criminal Law and Procedure § 157 (Cum. Supp. 1974); Williams, Criminal Law: The General Part § 52-74 (2nd ed. 1961); Model Penal Code § 2.04(1) (P.O.D. 1962). It is important to distinguish simple ignorance of fact from mistake of fact. Simple ignorance is generally *not* an excuse, because in such a situation the defendant cannot claim his action was lawful under the facts as he affirmatively believed them to be. *See United States* v. *Barker*, —— U.S. App. D.C. ——, ——, 514 F.2d 208, 267 & n. 73 (1975) (Wilkey, J., dissenting); Williams, *supra*, at 151-56.

hand, generally will not excuse the commission of an offense.[16] A defendant's error as to his *authority* to engage in particular activity, if based upon a mistaken view of legal requirements (or ignorance thereof), is a mistake of *law*. Typically, the fact that he relied upon the erroneous advice of another is not an exculpatory circumstance. He is still deemed to have acted with a culpable state of mind.[17]

Thus at first blush the trial judge's rejection of the defense proffered by the defendants—both in his pre-trial order and in his instruction to the jury—seems legally sound. He advised the jury that if the defendants honestly believed a *valid warrant* had been obtained, this would constitute a mistake of *fact* which would render them innocent of a conspiracy to conduct a search in violation of the Fourth Amendment. If, in contrast, they simply believed, despite the absence of a warrant, that for reasons of national security or superior authority the break-in was legal, such a mistake of *law* would not excuse their acts.[18]

B.

With all due deference to the trial judge, I must conclude that both charges were in fact incorrect, and that this error must be faced by the court on this appeal. The technical difficulty with the first instruction points up the deeper problem with the second.

A governmental search and seizure is not rendered lawful under the Fourth Amendment by the simple fact that a warrant has been obtained. The search is consti-

[16] Wharton's, *supra* note 15, at § 162; Williams, *supra* note 16, at c. 8; Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. Chi. L. Rev. 641, 642 (1941).

[17] *See* Perkins on Criminal Law 926-27 (2nd ed. 1969).

[18] Tr. at 2525-26, note 6, *supra*.

tutionally proper only if the accompanying warrant is based upon legally sufficient probable cause. A factual mistake as to whether a warrant has been obtained, therefore, would not necessarily excuse an unlawful search—because that search would not necessarily have been legal under the facts as the defendant believed them to be. As the District Court instructed the jury, only a mistake as to whether a *valid* warrant has been obtained would excuse the defendant's action, and that is a mistake of law. That the recipient of the warrant may have relied upon the opinion of a judge in determining that he had legally adequate probable cause to make a search does not, under traditional analysis, alter the situation. His mistake remains one of law, and, under a strict construction of the rule, will not excuse his unlawful act.

It is readily apparent that few courts would countenance an instruction to a jury—even assuming a criminal prosecution were brought against government agents in such a situation [19]—which advised that since the mistake in acting on an invalid warrant was one of *law*, it would not excuse the agent's unlawful search. It is neither fair nor practical to hold such officials to a standard of care exceeding that exercised by a judge. Moreover, although the basic policy behind the mistake of law doctrine is that, at their peril, all men should know and obey the law,[20] in certain situations there is an overriding societal interest in having individuals rely on the authori-

[19] Police officers, receiving and acting on such defective warrants, are rarely prosecuted. *See* Model Penal Code § 2.04 (P.O.D. 1962).

[20] For a full discussion of the various rationales which have been forwarded to support the mistake of law doctrine, see *United States* v. *Barker*, —— U.S. App. D.C. ——, ——, 514 F.2d 208, 227-37 (1975) (Bazelon, J., concurring).

tative pronouncements of officials whose decisions we wish to see respected.[21]

For this reason, a number of exceptions to the mistake of law doctrine have developed where its application would be peculiarly unjust or counterproductive.[22] Their recognition in a particular case should give the defendant a defense similar to one based upon mistake of fact, I submit, with one important difference. His mistake should avail him only if it is *objectively reasonable* under the circumstances.[23] The mistake of a government agent in relying on a magistrate's approval of a search can be considered virtually *per se* reasonable. (The first instruction of the District Court, therefore, was incorrect only in characterizing a defense based upon the belief that a valid warrant had been obtained as one of fact, rather than as an exception to the mistake of law doc-

[21] *See* Hall & Seligman, *supra* note 16, at 675-83. In support of the general proposition that in compelling circumstances the law will not deny a defense to individuals who have mistakenly relied on the authority of a public official, see *Cox* v. *Louisiana*, 379 U.S. 559 (1965), *Raley* v. *Ohio*, 360 U.S. 423 (1959), and *United States* v. *Mancuso*, 139 F.2d 90 (3rd Cir. 1943). *See also* Perkins, *supra* note 17, at 926-27.

[22] *See generally* Williams, *supra* note 15, at 293-345.

[23] In view of the strong public policy backing the mistake of law doctrine and the necessity for compelling justification to overcome it, it would appear rarely tenable to allow a defense based upon an irrational reliance on the authority of a public official. *See* Hall & Seligman, *supra* note 16, at 647. In contrast, although there is some authority to the effect that a mistake of *fact* must be reasonable to negate intent (Wharton's, *supra* note 15, at 382 n. 19), the better, and more widely held view is that even an unreasonable mistake of fact, if honest, constitutes a valid defense. Williams, *supra* note 15, at 201; Model Penal Code, Tentative Draft No. 4, at p. 136 (Commentary on § 2.04(1) (1953).

trine.[24] Similarly, if a private person is summoned by a police officer to assist in effecting an unlawful arrest, his reliance on the officer's authority to make the arrest may be considered reasonable as a matter of law. The citizen is under a legal obligation to respond to a proper summons and is in no position to second-guess the officer's determination that an arrest is proper. Indeed, it is society's hope in recognizing the reasonableness of a citizen's mistake in this situation to encourage unhesitating compliance with a police officer's call.[25]

Other situations in which a government official enlists the aid of a private citizen to help him perform a governmental task are not so obviously reasonable on their

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[24] The trial judge's error in this regard was certainly understandable. When the issue is one of reliance on authority, the distinction between law and fact becomes extremely difficult to discern. *See United States* v. *Barker*, —— U.S. App. D.C. ——, ——, 514 F.2d 208, 227-70 (opinions of Bazelon, C.J., concurring, MacKinnon, dissenting, and Wilkey, dissenting). Indeed, that difficulty underscores the correctness of my position in this case that in situations where a citizen is innocently drawn into illegal action at the behest, and on the authority, of a government official, he should be allowed a defense of mistake of *law* based upon his reasonable reliance. If his mistake were labelled one of fact, it would provide a complete defense no matter how unreasonable the reliance. *See* note 23 *supra*.

[25] This common law exception to the mistake of law doctrine is codified in section 3.07(4)(a) of the Model Penal Code, which states:

> (a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided he does not believe the arrest is unlawful.

face.[26] If the official does not *order* the citizen to assist him, but simply asks for such assistance, the citizen is not under a legal compulsion to comply.[27] Also, if the circumstances do not require immediate action, the citizen may have time to question the lawfulness of the planned endeavor. Nevertheless, the public policy of encouraging citizens to respond ungrudgingly to the request of officials for help in the performance of their duties remains quite strong. Moreover, the gap (both real and perceived) between a private citizen and a government official with regard to their ability and authority to judge the lawfulness of a particular governmental activity is great. It would appear to serve both justice and public policy in a situation where an individual acted at the behest of a government official to allow the individual a defense based upon his reliance on the official's authority—*if* he can show that his reliance was *objectively reasonable* under the particular circumstances of his case.

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[26] See the discussion of *People* v. *Weiss*, 276 N.Y. 384, 12 N.E.2d 514 (1938), in the opinions of Chief Judge Bazelon, concurring, and Judges MacKinnon and Wilkey, dissenting, in *United States* v. *Barker*, —— U.S. App. D.C. ——, ——, 514 F.2d 208, 234-36, 242-43, 265-70.

[27] The Special Prosecutor argues in the instant case that since the defendants were not ordered to aid in the Fielding break-in, they can draw no support from the common law "call to aid" rule. He cites section 3.07(4)(b) of the Model Penal Code for the position that when one is "not summoned" but nevertheless aids a police officer in making an unlawful arrest, only a mistake of fact is a valid defense. It would appear, however, that a citizen who is "asked" or "entreated" to assist a police officer bears a heavy civic responsibility to comply. He is effectively, if not technically, "summoned." In such a situation, although we might hesitate to presume the reasonableness of his action as a matter of law, if the citizen can show that his mistake as to the officer's lawful authority was in fact reasonable under the circumstances, I submit he makes out a valid defense.

C.

This brings us to the District Court's second instruction to the jury. Although the defendants characterized their mistake as to Hunt's authority as one of fact, rather than law,[28] they requested an instruction which substantially coincides with my view of the proper test:

> [I]f you find that a defendant believed he was acting out of a good faith reliance upon the apparent authority of another to authorize his actions, that is a defense to the charge in Count 1, provided you find that such a mistake by a defendant was made honestly, sincerely, innocently and was a reasonable mistake to make based upon the facts as that defendant perceived them.[29]

The District Court refused this instruction, regardless whether denominated a mistake of fact or an exception to the doctrine of mistake of law, and advised the jury simply that a mistake as to the legality of an unlawful search was no excuse.[30]

It is clear from the above discussion of the search innocently conducted under an invalid warrant that the court's instruction did not state the law, and that a mistake as to the legality of an unlawful search may sometimes be an excuse. The trial judge can justify such an instruction in this context only if there is no legal possibility of equating the reliance of Barker and Martinez on Hunt's apparent authority with the reliance of a police officer on a judicial warrant subsequently held invalid. And this will be true *if and only if* Barker and Martinez could not show *both* (1) *facts* justifying their reasonable reliance on Hunt's apparent authority and (2)

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[28] *See* note 24 *supra.*

[29] Barker Appendix at 104-05.

[30] Tr. 2525. *See* note 6 *supra.*

a legal theory on which to base a reasonable belief that Hunt possessed such authority.

Barker and Martinez meet the test as to *facts.* There was abundant evidence in the case from which the jury could have found that the defendants honestly and reasonably believed they were engaged in a top-secret national security operation lawfully authorized by a government intelligence agency. They were enlisted for the break-in by a White House official, E. Howard Hunt, whom they knew as a long-time government agent with the CIA. They were told that the operation concerned national security involving "a traitor to this country who was passing . . . classified information to the Soviet Embassy." Further, their long experience with the CIA had taught the defendants the importance of complete reliance on, and obedience to, their supervisor. That they should be expected to operate on a "need-to-know" basis was neither unusual nor cause for inquiry.

Barker and Martinez likewise meet the test as to the *legal theory* on which Hunt could have possessed such authority. That the President had the authority to confer upon a group of aides in the White House "more authority than the FBI or CIA," was in 1971 and is now by no means inconceivable as a matter of law. I certainly do not assert that the President here actually did so act (see the court's opinion in *Ehrlichman*), nor do we in this case need to decide the question of Executive authority to conduct warrantless searches pertaining to foreign agents, which issue was left open by the Supreme Court in *United States* v. *United States District Court* (*Keith*).[31]

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[31] 407 U.S. 297, 321-22 (1972). Barker and Martinez do not allege that they thought the President personally had authorized the operation, nor does the issue arise here as it does in *Ehrlichman.* Laymen Barker and Martinez would not be expected to have cognizance of the forty years'

What is so evident from the trial court's instructions and his previous legal memorandum, and likewise in the concurring statement of my colleague Judge Leventhal in *Ehrlichman*, is that neither the trial judge nor Judge Leventhal agree with the theory that the Chief Executive acting personally has a constitutionally conferred power, where the objects of investigation are agents or collaborators with a foreign nation, to authorize a visual or auditory search and seizure of materials bearing on the suspected betrayal of defense secrets, without securing a judicial warrant—in short, that in this very carefully defined area,[32] there does exist a constitutional Chief Executive warrant. They may be right. *But that is not the issue here for Barker and Martinez.* The issue is whether, given undisputed facts as known and represented to them, it was reasonable in 1971 for Barker and Martinez to act on the assumption that authority had been validly conferred on their immediate superior. The trial judge and my colleague have been unable to restrain themselves from inferentially deciding the issue deliberately left open by the Supreme Court in *Keith* in 1972, and having done so then proceed to tax Barker and Martinez with a failure to have acted on *their* unestablished rationale in 1971.

That the President would have such power under the Constitution is and has always been the clear position of the Executive Branch. Significantly, the present Attorney General only recently commented on *Keith* to this effect: "In *United States* v. *United States District Court*, while holding that the warrant requirement of the Fourth Amendment applied in the domestic security field, the Court expressly stated that 'the instant case requires no judgment with respect to the activities of foreign powers, *within or without this country*.' (Emphasis the Attorney General's.) It is not without significance that the words of the Court focus on the subject matter of the surveillance, rather than on the physical location where it is conducted."[33] No court has yet ruled that the President lacks this prerogative in a case involving wiretapping of foreign agents or collaborators with a foreign power.[34]

practice whereby foreign affairs surveillances were authorized without a warrant either by the Attorney General or President. Their justification is a reasonable mistake of law, and in their position and known facts a reasonable mistake of law involves a mistake as to Hunt's authority, not that of the Attorney General or President.

[32] *See Zweibon* v. *Mitchell*, —— U.S.App.D.C. ——, ——, 516 F.2d 594, 689 (1975) (en banc) (Wilkey, J. dissenting), *cert. denied*, 44 U.S.L.W. 3587 (19 April 1976).

In the instant case, the Department of Justice, while supporting the Special Prosecutor on other issues, within the limits of a 300-word Memorandum, took the pains to state:

> In regard to warrantless searches related to foreign espionage or intelligence, the Department does not believe there is a constitutional difference between searches conducted by wiretapping and those involving physical entries into private premises. One form of search is no less serious than another. It is and has long been the Department's view that warrantless searches involving physical entries into private premises are justified under the proper circumstances when related to foreign espionage or intelligence (See U.S. Brief p. 45, n. 39).[35]

[33] The Record of the Association of the Bar of the City of New York, Vol. 30, p. 331 (May-June 1975).

[34] *United States* v. *Butenko*, 494 F.2d 593 (3rd Cir. 1974), *cert. denied, Ivanov* v. *United States*, 419 U.S. 881 (1974). *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973). Cf. *Zweibon* v. *Mitchell*, —— U.S.App.D.C. ——, 516 F.2d 594 (1975) *cert. denied*, 44 U.S.L.W. 3587 (19 April 1976), (distinctly non-collaborators with the Soviet Union were the objects of electronic surveillance).

[35] Memorandum for the United States as Amicus Curiae, p. 2.

Finally, on 19 February 1976, the Attorney General announced his decision, on the recommendation of the Deputy Attorney General and the head of the Civil Rights Division, not to prosecute former CIA Director Richard Helms for his personally authorizing a 1971 break-in at a photographic studio as part of a national security violation investigation.[36] Helms, like the

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[36] The Department of Justice announcement said:

> The Department of Justice will not prosecute former CIA Director Richard Helms and others for their role in a 1971 break-in at a photographic studio in Fairfax City, Virginia, Attorney General Edward H. Levi announced today.
>
> . . . .
>
> The Department's investigation involved the surreptitious entry by CIA agents and Fairfax City police into a photographic studio on February 19, 1971.
>
> The Federal statute under which prosecution was considered is Section 242 of Title 18, United States Code.
>
> The leading case interpreting that statute, *Screws* v. *United States*, 325 U.S. 91, 104 (1945), requires proof that the accused willfully deprived an individual of a specific and well-defined constitutional right.
>
> After studying the facts carefully and interrogating the witnesses at length, the Department concluded that the evidence did not meet the standard set by the *Screws* case to establish a criminal violation of the statute.

The written announcement was amplified, according to *The Washington Post* of 20 February 1976, pp. A1 and A6, as follows:

> Justice Department sources said that Helms clearly thought he had the authority to approve a break-in and did so to complete a security investigation. . . .
>
> "It was impossible to prove he (Helms) had intent to violate anyone's civil rights," one Justice Department source said. . . .
>
> The 1947 law setting up the CIA says, "The Director of central intelligence shall be responsible for protecting

present defendants, was involved in a 1971 break-in to conduct a visual search for evidence of national security violations. The positions of both Helms and the present appellants rest upon good faith belief that their warrantless physical intrusions were legally authorized. Helms' belief, which led the Justice Department to decline prosecution, was that a statute authorized him to ignore the commandments of the Fourth Amendment. Barker's and Martinez's belief was that there was authorization within the White House for this intrusion relating to national security—a legal theory which, if valid, would be of constitutional rather than merely statutory dimensions. Though both were mistakes of law, appellants' view thus appears to be supported by sounder legal theory than that of Helms, who seems to assert that a statute can excuse constitutional compliance. Yet even in the case of Helms, the Attorney General concluded that any prosecution for the physical search would be inappropriate.

The trial court rejected the pleas of appellants Barker and Martinez that they should have been allowed a de-

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> intelligence sources and methods from unauthorized disclosure."
>
> Under this law Justice Department attorneys said they felt Helms could reasonably argue the protection required extraordinary means.

Mr. Helms' counsel is reported as commenting, "If the government has a right to conduct electronic surveillance, then it has a right to make surreptitious entry." *The Washington Post*, 20 February 1976, at A1.

Naturally I share my colleague's distaste for the necessity to rely upon an Executive Department's press release or a newspaper article related thereto. Where prosecution is declined, however, by definition no paper is ever filed in a court. An official written announcement of the Department of Justice, giving a terse summary of the legal rationale supporting the decision, is more than is usually available and all that can ever be expected.

fense on proof of reasonable, though mistaken, belief that their actions were duly authorized by an organization "at the White House level . . . above the FBI and the CIA." Either the Attorney General was wrong on 19 February 1976 when he declined prosecution of Director Helms, or the trial judge here was wrong when he barred the evidence and jury instruction which might have acquitted Barker and Martinez. I believe, as set forth in the previous nineteen pages, that the trial judge was wrong and the Attorney General right. But even if I am in error on this, of one thing I am certain: In 1971 there was not in the United States of America one Fourth Amendment for Richard Helms and another for Bernard Barker and Eugenio Martinez.

As to the *reasonableness* of the legal theory on which Barker's and Martinez's actions rest, they thus have at least the position of the Attorney General behind them. This is not to hold here that the position is correct, but surely two laymen cannot be faulted for acting on a known and represented fact situation and in accordance with a legal theory espoused by this and all past Attorneys General for forty years. It is in implicit recognition of this that Judge Leventhal feels obliged to attempt to undermine the theory on the merits [37] by trying

[37] Albeit Judge Leventhal makes his statement in *Ehrlichman*, where the issue of apparent approval by a higher authority does not arise. No one represented to Ehrlichman that he was acting on higher authority for Ehrlichman *was* higher authority in that case. *See* court's opinion in *Ehrlichman*, No. 74-1882, at 21.

With regard to the comparative positions of the offices of the Attorney General and the Special Prosecutor, and with all due respect to the public service this special task force has rendered in a time of crisis, it *is* a special task force created in 1973 which will shortly disband and close its files. The Attorney General has been with us since President Washington's first cabinet meeting in 1789, and is not about to go out of business. The Attorney General, then, represents a long perspective of what our legal problems in this most delicate area of national security and constitutional principles have been for 200 years and are likely to be in the future. That perspective of the Attorney General is deepened by the vast accumulated experience reposing in the personnel and files of the Department of Justice, heightened by the close personal relationship between President and Attorney General at some periods of our history, and sharpened by the current awareness of the present Attorney General as to what great problems in this area loom in the immediate future. In evaluating the conflicting views of the two offices, these factors surely must be placed in the balance by any court ultimately applying constitional principles to national security problems.

to distinguish between wiretapping and physical entry; according to Judge Leventhal, the first *perhaps* constitutionally granted to the President, the second never.[38]

Since the issue here is not the correctness of the legal theory, but the reasonableness in 1971 of acting consonant with it, and since the Department of Justice ad-

[38] Judge Leventhal asserts (p. 10) "[t]here may well be a critical difference between electronic surveillance and physical entries for the purpose of search and seizure . . . ," and approves the Special Prosecutor's stress on certain language in *Keith*. The partially quoted thought from the Supreme Court complete is, "Though physical entry of the home is the chief evil against which the *wording* of the Fourth Amendment is directed, its *broader spirit* now shields private speech from unreasonable surveillance. (Citing *Katz*, *Berger*, and *Silverman*) Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass." 407 U.S. at 313 (emphasis supplied).

I cannot agree that Justice Powell's language, specifically cited by Judge Leventhal and the Special Prosecutor to prove a constitutional difference "between electronic surveillance and physical entries," supports the difference at all. I respectfully suggest the opposite meaning is conveyed, *i.e.*, physical and electronic entry stand on the same footing, good or bad. And that is all that it is necessary to understand to validate Barker's and Martinez's argument that they lacked the requisite criminal intent in 1971, given the state of Fourth Amendment law then and now.

dressed the issue to this court in only one paragraph, a brief reply to Judge Leventhal may suffice: (1) a physical trespass is usually necessary to install a wiretap, whether the tap is authorized by the Judiciary or the Executive; (2) such physical trespasses have repeatedly been authorized by judges, Presidents, and Attorneys General; (3) they will continue to be so authorized until the Supreme Court rules otherwise; (4) *what is the constitutional difference* between a physical entry (Presidentially authorized) for the purpose of an *auditory search* (wiretap) and a physical entry (Presidentially authorized) for the purpose of a *visual search* (photographing documents)? What is the constitutionally relevant distinction between surreptitiously listening to (or recording) a citizen's spoken words and looking at (or photographing) his written words? (5) If there is no difference, then when the Supreme Court reserved the question of wiretapping (auditory searches) in *Keith*, did it not also logically and necessarily reserve the same issue in regard to visual searches?

We all know that *physical entry* for the purpose of *auditory search* has been authorized by President and Attorney General for forty years in national security related cases. It is the constitutional validity of this which the Supreme Court has never voided but specifically reserved in *Keith*. We all know (or suspect) that *physical entry* for the purpose of *visual search* has been authorized by President and Attorney General for many years in national security related cases. It is the constitutional validity of this which the Attorney General reserved in one paragraph of his two-page memorandum in this case, but which has never reached the Supreme Court. Unpermitted physical entry into a citizen's dwelling is no doubt the core of the Fourth Amendment prohibition against unreasonable searches and seizures,[39]

[39] It can be readily agreed that the framers of the Fourth Amendment were primarily concerned with physical intrusions by governmental officials into the sanctity of the home. It is extremely doubtful, however, that this tells us anything about how they would have regarded electronic intrusions. Not being blessed with the telephone, they never considered the problem of wiretaps. A good argument can be made that electronic, "non-trespassory" searches are more intrusive than their "trespassory" counterparts. *United States* v. *Smith*, 321 F.Supp. 424 (D.D.C. Cal. 1971), reasoned:

> [E]lectronic surveillance is perhaps the most objectionable of all types of searches in light of the intention of the Fourth Amendment. It is carried out against an unsuspecting individual in a dragnet fashion, taking in all of his conversations whether or not they are relevant to the purposes of the investigation and continuing over a considerable length of time. If the government's "reasonableness" rationale is accepted in this case, then it would apply *a fortiorari* to other types of searches. Since they are more limited in time, place and manner, they would be even more reasonable.

Id. at 429.

[40] The only possible rationale for distinguishing electronic information gathering from physical searches is that, in the District Court's words, the former is "less intrusive" than the latter. Exactly why this might be so is not explained in Judge Leventhal's opinion. *See* note 38 *supra*. The Special Prosecutor, however, defends the distinction by repeatedly emphasizing in his brief that a wiretap is *non-trespassory*. He suggests that if the Government must effect a trespass in order to place wiretapping or bugging equipment—and certainly if a trespass is made in order to photograph documents—then immunity from the warrant requirement in cases related to foreign affairs is lost.

The Special Prosecutor cites no authority in direct support of this proposition. He relies essentially on an absence of discussion of the question to create a heretofore unsuggested distinction. Neither logic, history, nor case law, how-

but physical entry for an auditory or visual search may stand on the same footing, whether constitutionally firm or infirm.[40]

That auditory and visual searches and physical entry to effect them stand on the same footing, is what the Department of Justice memorandum maintained. It also stated that both are valid in the strictly limited espionage and intelligence area. After *Katz* [41] in 1967 ruled out completely the patently untenable distinction between trespassory and non-trespassory wiretaps and held that

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ever, provides an adequate basis for this artificial differentiation.

From a logical standpoint, if a President has the authority pursuant to his foreign affairs power to approve surveillance activities, it would appear that his prerogative is no different from that of a court reviewing a warrant request in a more mundane criminal setting. If there is a "national security" exemption (which neither the Supreme Court in *Keith* nor this court in *Zweibon* ruled out), the task of determining whether such a search is justified falls to the Executive, rather than to the courts. All the elements of speed, secrecy, and Executive expertise which support vesting this power in the President where wiretapping (whether "trespassory" or "non-trespassory") is involved also apply where a photographic search is in question. Court-ordered surveillances are sometimes trespassory, sometimes not, depending on the requirements of the situation, and so are Executive surveillances in the foreign affairs field.

The record in a recent case in this court provides documentation of judicial authorization for government agents to "Intercept wire communications [etc. and to] Install and maintain an electronic eavesdropping device within the [room of a building at a specific address] to intercept [certain specified] oral communications . . . concerning [certain] described offenses. Installation of the above described eavesdropping device may be accomplished by any reasonable means, *including surreptitious entry or entry by ruse.*" *United States* v. *Barker*, —— U.S.App.D.C. ——, ——, 514 F.2d 208, 241-42 (1974) (MacKinnon, J., dissenting). Of course, if a trespass is not necessary in a particular case to effect an eavesdrop, the court need not gratuitously authorize a surreptitious entry; but few would question a court's power to do so in those cases in which it is required.

[41] *United States* v. *Katz*, 389 U.S. 347 (1967).

the application of the Fourth Amendment could not turn on the presence or absence of a physical intrusion, it would appear *arguable* that physical entry for either an auditory or visual search for material related to an agent or collaborator with a foreign nation, if authorized by the President or Attorney General, would be valid under the Executive's constitutional foreign affairs powers.

This court need not pass and does not pass on the correctness of the Attorney General's position. I do think that defendants Barker and Martinez were entitled to act in objective good faith on the facts known to them in regard to Hunt's position and implicitly on the validity of a legal theory, still to be disproved, which has been vigorously espoused by President and Attorney General for the last forty years. I think it plain that a citizen should have a legal defense to a criminal charge arising out of an unlawful arrest or search which he has aided in the reasonable belief that the individual who solicited his assistance was a duly authorized officer of the law. It was error for the trial court to bar this defense in the admission of evidence and instructions to the jury, and the convictions must accordingly be

Reversed.

MERHIGE, *District Judge*: While I generally concur with the positions taken by my Brothers with respect to the "specific intent" requirement of 18 U.S.C. § 241, I am not, despite my concurrence with the results reached by Judge Wilkey willing to fully subscribe to the views expressed by him in his analysis of the mistake of law issue. Our differences arise from my inability to acquiesce in the broad framework inherent in his analysis. My views in this regard follow:

Defendants Barker and Martinez rest their appeal on the district court's refusal to instruct the jury that a "good faith reliance upon the apparent authority of another to authorize [their] actions" is a defense to the charge of conspiracy under Title 18 U.S.C. § 241. The district judge advised the jury that a mistake of law is no excuse, and, therefore, that a mistake as to the legality of the search in issue was not a defense to the charges contained in the indictment. In that regard, the district judge was applying the general rule on mistake of law that has long been an integral part of our system of jurisprudence. *See, e.g., Lambert* v. *California*, 355 U.S. 225, 228 (1957) quoting *Shelvin-Carpenter Company* v. *Minnesota*, 218 U.S. 57, 68 (1910). See generally Hall & Seligman, Mistake of Law and Mens Rea, 8 University of Chicago Law Review 641 (1941); Keedy, Ignorance and Mistake in the Criminal Law, 22 Harv. L. Rev. 75 (1908); Perkins, Ignorance and Mistake in Criminal Law, 88 Univ. of Pa. L. Rev. 35 (1939). The most commonly asserted rationale for the continuing vitality of the rule is that its absence would encourage and reward public ignorance of the law to the detriment of our organized legal system, and would encourage universal pleas of ignorance of the law that would constantly pose confusing and, to a great extent, insolvable issues of fact to juries and judges, and bog down our adjudicative system. See *United States* v. *Barker*, 514 F.2d 208, 230-32 (D.C. Cir. 1975, Bazelon, Chief Judge concurring), Hall

& Seligman, supra at 646-51. The harshness of the rule on the individual case is responded to by either or both of two thesis: individual justice and equity is outweighed by the larger social interest of maintaining a public knowledge about the law so as to discourage and deter "illegal" acts; and, as discussed by Judge Leventhal in his view of this case, the rule is subject to mitigation by virtue of prosecutorial discretion, judicial sentencing, executive clemency, and/or jury nullification.[1] *E.g.*, Perkins, supra at 41.

Exceptions to the rule, however, have developed in situations where its policy foundations have failed to apply with strength, and alternative policy consideration strongly favor a different result. The exceptions have been both statutory, *e.g.*, Act of August 22, 1940, § 49, 15 U.S.C. § 80a-48; Public Utility Holding Company Act of 1935, § 29, 15 U.S.C. § 79z-3, and judicial. *E.g.*, *United States* v. *Mancuso*, 139 F.2d 90 (3d Cir. 1943); *Moyer* v. *Meier*, 205 Okla. 405, 238 P.2d 338 (1951); Anno., 29 A.L.R.2d 825 (1953). See also Model Penal Code §§ 2.05(3), 3.07(4)(a) . The instant case fits the pattern of a set of circumstances that has been recognized by some, and that in my view should be endorsed by this Court as an exception to the general rule. Defendants Barker and Martinez contend that they were affirmatively misled by an official interpretation of the relevant law, and are entitled to an instruction to that effect, permitting the jury to assess the reasonableness and sincerity of their alleged reliance.

The Model Penal Code states the defense as follows:

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[1] This Circuit has held that jury instructions on nullification are improper. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972). The Court acknowledges, however, that a jury still may acquit in disregard of the instructions on the law given by the trial judge. *Id.* at 1132.

> A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense based upon such conduct when: . . . (b) he acts in reasonable reliance upon an official statement of the law, afterward determined to be invalid or erroneous, contained in (i) a statute or other enactment; (ii) a judicial decision, opinion or judgment; (iii) an administrative order or grant of permission; or (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense. § 2.04(3)(b).

See also Proposed New Federal Criminal Code, Final Report of a National Commission on Reform of Federal Criminal Laws § 610 (1971). The rationale of the section is well illustrated by the case of *United States* v. *Mancuso*, 139 F.2d 90 (3d Cir. 1943). The legal issue therein was whether a defendant could be punished for failure to obey an order made by a local draft board when its issuing of such an order to the defendant was interdicted by a judicial decree which was itself, erroneous and subject to reversal. The court in that case stated:

> We think the defendant cannot be convicted for failing to obey an order, issuance of which is forbidden by the court's injunction. While it is true that men are, in general, held responsible for violations of the law, whether they know it or not, we do not think the layman participating in a lawsuit is required to know more than the judge. 139 F.2d at 92. (Footnote omitted)

The introduction of an "official" source for an individual's reliance on a mistaken concept of the law in acting "illegally" significantly diminishes the strength of the policy foundations supporting the general rule on mistake of law, and adds policy considerations of grave import that would favor an apposite result. In my view, the defense is available if, and only if, an individual (1) reasonably, on the basis of an objective standard, (2) relies on a (3) conclusion or statement of law (4) issued by an official charged with interpretation, administration, and/or enforcement responsibilities in the relevant legal field. The first three issues are of course of a factual nature that may be submitted to a jury; the fourth is a question of law as it deals with interpretations of the parameters of legal authority.

Exoneration of an individual reasonably relying on an official's statement of the law would not serve to encourage public ignorance of law, for the defense requires that the individual either seek out or be cognizant of the official statement upon which he or she relies. Some knowledge of the law, verified by an independent and typically competent source, is required. Furthermore, pleas of ignorance of the law will neither be so universal nor so abnormally confusing to the fact-finder as to discompose the judicial process. The defense is precisely limited to be consistent with its policies, and it involves issues no more complex than those decided on a routine basis in other matters.

Furthermore, the defense advances the policy of fostering obedience to the decisions of certain individuals and groups of individuals that society has put in positions of prominence in the governing structure—*i.e.*, courts, executive officials and legislative bodies. While the policy is unquestionably strongest when applied to those bodies that apply or make law with the most apparent finality, *i.e.*, legislatures and the courts, it has application as well to those in official positions that "interpret" the law in a largely advisory capacity, *i.e.*, opinions of the United States Attorney General. The reasonableness of the reliance may dissipate if one depends on non-enforceable advisory opinions of minor officials however. The policy is limited by the actual existence of an appropriate "official(s)" and does not support an abrogation of

the policies behind the general mistake of law rule if an individual places his or her reliance, though reasonable, in a stranger to public office erroneously believing him to be an official.[2] Similarly, the defense does not extend to reliance on individuals, who although employed in a public capacity, have no interpretative or administrative responsibilities in the area associated with the legal concepts involved in the mistaken opinion or decision.

The defense has been most commonly accepted when an individual acts in reliance on a statute later held to be unconstitutional,[3] or on an express decision of unconstitutionality of a statute by a competent court of general jurisdiction that is subsequently overruled.[4] Most jurisdictions will not permit a defense based on reliance upon the advice of counsel.[5] The defense, however, is not limited to those which have been most commonly accepted as I have heretofore made reference. In *State* v. *Davis*, 216 N.W.2d 31 (Wisc. 1974), the defendant was exon-

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[2] Similarly, the defense of mistake of law historically given a private person when he responds to a request by a police officer to aid in making an arrest and the arrest proves ultimately to have been unlawful, is limited by the requirement that the party aided has the authority to make the arrest. *E.g.*, Dietrichs v. Schaw, 43 Ind. 175 (1873); Moyer v. Meier, 205 Okla. 405, 238 P.2d 338, 340 (1951).

[3] *E.g.*, Claybrook v. State, 164 Tenn. 440, 51 S.W.2d 499 (1932); State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898). *But see* Dupree v. State, 184 Ark. 1120, 44 S.W.2d 1097 (1932).

[4] *E.g.*, United States v. Mancuso, 139 F.2d 90 (3d Cir. 1943); State v. O'Neil, 147 Iowa 513, 126 N.W. 454 (1910); State v. Chicago, M. & St. P. Ry. Co., 130 Minn. 144, 153 N.W. 320 (1915); State v. Longino, 109 Miss. 125, 67 So. 902 (1915); State v. Jones, 44 N.W. 623, 107 P.2d 324 (1940). *But see* Hoover v. State, 59 Ala. 57 (1877).

[5] *E.g.*, Staley v. State, 89 Neb. 701, 131 N.W. 1028 (1911); State v. Whiteaker, 118 Ore. 656, 247 P. 1077 (1926).

erated on the basis of a reliance on erroneous advice of a county corporation counsel and assistant district attorney. In *People* v. *Ferguson*, 24 P.2d 965 (Cali. 1933), reliance on the advice of the state corporation commissioner and deputy commissioners was held to excuse a violation of the state's blue sky laws. See also *Texas Co.* v. *State*, 254 P. 1060 (Ariz. 1927); *State* v. *White*, 140 S.W. 896 (Mo. 1911); *State* v. *Person*, 1 S.E. 914 (N.C. 1887). But see *U.S.* v. *Mansavage*, 178 F.2d 812 (7th Cir. 1949); *Hopkins* v. *State*, 69 A.2d 456 (Md. 1949); *Staley* v. *State*, 131 N.W. 1028 (Neb. 1911); *State* v. *Foster*, 46 A. 833 (R.I. 1900).

Arguments against extending the defense to reliance on the advice of government officials take a form of the following proposition: Minor government officials will have the ability to effectively "immunize" individuals from prosecution. In response, it must be noted that with respect to a particular statement, a government official is himself culpable if he knowingly mistakes the law. Hence he may proffer mistaken advice without retribution only until he discovers its invalidity. To argue further, that incompetent or dishonest minor officials may exist in numbers serious enough to question reliance on their decisions or interpretations, inherently characterizes those public servants upon whom we must depend for the ultimate success of the operation of our government, as suspect. I for one, am not willing to assume that the incidence of incompetent, insensitive or dishonest public officials is significant enough to dispute the premise that in general, public officials merit the respect of the public. Furthermore, our citizenry are not so naive as not to recognize that all of our institutions, are susceptible of being made up of both savory and unsavory individuals.

Still some will have cause to be concerned about the extent of the exception to the general rule. Judge Leventhal notes that "[t]he potentially broad range of illegal

activities that a government official might request a private citizen to do, would make it impossible to rely on the educational value that normally inheres when a mistake of law is recognized as an excuse in one case that serves to define them all for similarly circumstanced defenders in the future." The argument is one of great appeal. Nevertheless, it smacks of a distrust of public officials, yet to so categorize it may be unfair. In essence, it asserts that since there exists a large number of public officials who may well be asked to advise or decide on a myriad of legal problems, that many mistaken judgments may be advanced and members of the public should be required before acting in accordance therewith to examine those interpretations at their peril. The argument, assuming as I do that it is not directed at corrupt officials, requires the individual citizen to be more cognizant of and have a better understanding of the law than a public official who is responsible for and specifically employed to make interpretations of the law in the relevant legal field. Such a burden is, in my view, unreasonable. Finally, it should be noted that the strength of the arguments premised upon the potential extent of the defense is mitigated by the requirement of objective reasonableness. If a public official's opinion of th law is fairly outrageous, the jury may conclude that a reasoanble man would take appropriate steps to verify it prior to reliance thereon.

Applying the defense to the facts of this case, the record discloses sufficient evidence of reliance on an official interpretation of the law for the matter to have been submitted to the jury. Barker and Martinez assert that they relied on Hunt's authority as delegated from an intelligence superstructure controlled by the White House, and firmly believed that they were acting in a legal capacity. The Executive Branch of the United States Government is vested with substantive responsibilities in the field of national security, and decisions of its officials on the ex-

tent of their legal authority deserve some deference from the public.[6] A jury may well find that John Ehrlichman, then Assistant to the President for Domestic Affairs, expressed or implied that the break-in of Dr. Field's office was legal under a national security rationale, and that Hunt, as an executive official in a go-between capacity, passed the position on to the defendants, which they, acting as reasonable men, relied upon in performing the break-in.[7]

Accordingly, while I concur with Judge Wilkey that the jury should have been instructed on a limited mistake of law defense, I believe any such instruction should, in the event of a retrial be couched consistent with the views herein expressed.

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[6] This is not to say that I concur in the view of the Attorney General that there is a "national security" exception permitting physical intrusion in a citizen's home or office on specific approval of the President or Attorney General, even in the absence of a valid warrant. That issue is not before us.

[7] See Footnotes 4 and 5 in Judge Leventhal's opinion.

LEVENTHAL, *Circuit Judge dissenting*: This opinion considers the appeals of Bernard L. Barker and Eugenio R. Martinez, who were convicted of conspiracy in violation of 18 U.S.C. § 241, and sentenced to three years probation. They were charged, along with co-defendants John D. Ehrlichman and G. Gordon Liddy, with conspiracy to enter without lawful authority the offices of Dr. Lewis J. Fielding on September 3, 1971, in order to search for confidential information concerning his patient, Daniel Ellsberg, thereby injuring Dr. Fielding in his Fourth Amendment right to be secure against unreasonable searches and seizures.

Barker and Martinez present considerations and issues that differ in some respects from those discussed in the opinions issued today in the cases of Ehrlichman and Liddy. I would reach the same result, of affirmance. Whatever equities may pertain to the case of these defendants of Cuban origin, who claim that their actions reflect their patriotism, were taken into account when the trial judge limited their sentence to a modest probation. Their quest for complete exculpation does not entitle them, in my view, to a ruling that the trial judge was mistaken as to the pertinent principles of law.[1]

My opinion explaining why I dissent from the reversals contemplated by Judges Wilkey and Merhige, is cast in the conventional form of opinions that present first a statement of facts, then an orderly discussion of

[1] Defendants also contend that the district court erred in failing to dismiss the indictment for grand jury improprieties; in failing to correct for prejudicial publicity; and in failing to give a jury nullification charge. The grand jury point is dealt with in note 58, *infra*. Their claims of error in refusing to dismiss the indictment or order a continuance or change of venue on prejudicial pretrial publicity grounds should be rejected for the reasons set forth in United States v. Ehrlichman, decided this day, at note 8. A right to a jury nullification charge was rejected by this court in United States v. Dougherty, 154 U.S.App.D.C. 76, 93-100, 473 F.2d 1113, 1130-1137 (1972), and that decision controls defendants' claim as well.

the legal principles more or less seriatim. This case also calls, I think, for an opening exclamation of puzzlement and wonder. Is this judicial novelty, a bold injection of mistake of law as a valid defense to criminal liability, really being wrought in a case where defendants are charged with combining to violate civil and constitutional rights? Can this extension be justified where there was a deliberate forcible entry, indeed a burglary, into the office of a doctor who was in no way suspected of any illegality or even impropriety, with the force compounded by subterfuge, dark of night, and the derring do of "salting" the office with nuggets to create suspicion that the deed was done by addicts looking for narcotics?

Judge Wilkey begins to cast his spell by describing Barker and Martinez as "footsoldiers" here in court again. Of course, they are here this time for an offense that took place the year before the notorious 1972 Watergate entry that led them to enter pleas of guilty to burglary. Every violation of civil rights depends not only on those who initiate, often unhappily with an official orientation of sorts, but also on those whose active effort is necessary to bring the project to fruition. To the extent appellants are deemed worthy of sympathy, that has been provided by the probation. To give them not only sympathy but exoneration, and absolution, is to stand the law upside down, in my view, and to sack legal principle instead of relying on the elements of humane administration that are available to buffer any grinding edge of law. That this tolerance of unlawful official action is a defense available for selective undermining of civil rights laws leads me to shake my head both in wonder and despair.

I. FACTUAL BACKGROUND

Barker and Martinez are both American citizens.[2]

[2] Barker was an American citizen by birth, lost his citizenship while living in Cuba, but reacquired it. (Tr. 2187). Martinez became a naturalized citizen in July 1970 (Tr. 2149).

They fled Cuba for Miami, Florida, after Fidel Castro came to power. Both Barker and Martinez have been covert agents for the Central Intelligence Agency. Martinez worked for the CIA from 1959 until 1972, and was involved in infiltrating Cuba and supplying arms and ammunition to Cuba from a United States base. Barker worked undercover in Cuba before his arrival in Miami in 1960. He was terminated in 1966. During their CIA employment both Barker and Martinez were involved with the Bay of Pigs operation, and Barker's immediate superior for that venture was E. Howard Hunt, known as "Eduardo" in Miami's Cuban-American community.

Hunt, along with Egil Krogh, David Young and G. Gordon Liddy, composed the White House "Room 16" Unit. The unit was established under the supervision of John Ehrlichman, then Assistant to the President for Domestic Affairs, to investigate and stop leaks of classified information. Publication of the "Pentagon Papers" was the catalyst for the Room 16 unit's formation, and obtaining information on the source of that famous leak —Daniel Ellsberg—became the unit's primary concern. After Ellsberg's psychiatrist, Dr. Fielding, refused to be interviewed by FBI agents, the unit decided to obtain copies of Ellsberg's medical records by a surreptitious entry of Dr. Fielding's office.

To avoid White House employee involvement in the actual search, Hunt recruited Barker, and through Barker, Martinez and Felipe De Diego.[3] Barker testified

[3] Although De Diego was indicted under § 241 along with the other defendants, the District Court on May 22, 1974, ordered the indictment as to De Diego dismissed with prejudice on the ground that the Government could not meet its burden of showing that its case was not tainted by the use of immunized testimony. This court reversed that order. United States v. De Diego, 167 U.S.App.D.C. 252, 511 F.2d 818 (1975). The Special Prosecutor, however, subsequently elected not to pursue the prosecution.

(Tr. 2197ff) that Hunt said he was in an "organization that had been created in the White House level—this organization he described as a sort of superstructure that was above the FBI and the CIA" and "had been formed because the FBI was tied by Supreme Court decisions . . . and the Central Intelligence Agency didn't have jurisdiction in certain matters." He spoke of "some kind of upheaval in the intelligence community in Washington" and asked if Barker would like to become operational again, which Barker termed a "very happy thing to us."

While conducting these negotiations, Hunt represented himself accurately as working in the White House.[4] We may assume for present purposes that a jury might reasonably find that Barker and Martinez did, as they later put it, believe or assume that Hunt was a "CIA man" in the White House, notwithstanding contrary indications.[5] Martinez was aware that his participation

[4] Barker visited and telephoned Hunt in his Executive Office Building office, and also received letters from Hunt on White House stationery, all serving to corroborate Hunt's employment.

[5] The Barker-Martinez brief notes (p. 12) that with respect to Martinez's reporting "Eduardo's" visit to Miami to his CIA case officer, "[t]he failure of his case officer to respond on the first occasion was significant to Martinez because normally when he reported the presence of someone associated with the CIA in Miami he was told whether the person's name was cleared. (M., Tr. 2157-58). On the second occasion the case officer's denial that 'Eduardo' was in the White House, something which Martinez knew to be a fact, led Martinez to conclude that his case officer either was not supposed to know about Hunt or that his case officer did not want to convey Hunt's importance. (M., Tr. 2157). . . At a later point Barker told Hunt that he had also assumed at the time that Hunt was still with the CIA and simply had been positioned at the White House by the agency, a customary CIA practice. (Hunt, Tr. 918-20)."

in the plan might have been illegal for a "normal citizen." (Tr. 2170).

On September 2, 1971, Hunt and Liddy met Barker, Martinez and De Diego at a hotel in Beverly Hills, California. Hunt informed the defendants that they were to enter Dr. Fielding's office and photograph the files of one of his patients. They were told that Dr. Fielding was not himself the subject of investigation. There was no discussion of authorization for the entry and search. The group met the following day, and Hunt showed Barker and Martinez identification papers and disguises obtained from the CIA.

On the evening of September 3, Barker and De Diego, dressed as delivery men, delivered a valise containing photographic equipment to Dr. Fielding's office. Later that evening they and Martinez, having been told that the "Ellsberg" file was the one they were to search for and photograph, entered Dr. Fielding's office and rifled the files. They entered by force, breaking the lock on the office door, and also used force, a crowbar, to open Dr. Fielding's file cabinets. Although the plan was to accomplish entry without force, it also included the alternative that in the event force had to be used, Barker and his colleagues were to make the entry look as if it had been by an addict seeking drugs, and accordingly, before leaving, they scattered pills about the office. The next day Barker and Martinez returned to Miami, having failed to locate the Ellsberg records.

As a defense to the March 7, 1974, indictment for conspiring to violate Dr. Fielding's Fourth Amendment rights, Barker and Martinez sought to discover and present evidence as to the reasonableness of their belief in Hunt's authority to conduct the Fielding operation. Their motion for discovery and their proposed instructions based on the defense of reasonable reliance on Hunt's apparent authority were denied by the District

Court.[6] At trial both defendants were nevertheless given latitude to testify extensively about the circumstances underlying their involvement in the Fielding break-in. The jury was advised that to convict they had to find the purpose of the break-in was to enter and search Dr. Fielding's office without a warrant or permission, and that the conspirators were governmental employees or agents acting for governmental rather than purely personal purposes. The court further instructed the jury that a mistake of fact may constitute a defense to the conspiracy charge, so that if a defendant honestly believed a warrant had been obtained, this mistake of fact would render him innocent, because it would not be said he intended a warrantless search.[7]

II. Affirmative Defenses

The defendants' principal argument on appeal is the claimed error of the District Court in refusing them a defense based upon their good faith reliance on Hunt's apparent authority. They say the *mens rea* required for a violation of section 241 was negatived by a mistake of fact "coupled with" a mistake of law.[8] They amplify: "The mistake of fact was the belief that Hunt was a duly authorized agent; the mistake of law

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[6] *See* United States v. Ehrlichman, 376 F. Supp. 29, 35-36 (D.D.C. 1974); Barker Appendix at 104-05. The text of the proffered instruction is set out in note 15 *infra*.

[7] Tr. 2524-26. While the trial judge said "valid warrant," there was no testimony or contention that defendants had a belief that a warrant had been obtained. A person can act upon the basis of a warrant that has been issued in fact, even though it is later held invalid, without incurring personal legal responsibility. This would come within the narrow class of cases where a reasonable mistake of law does constitute a defense, as set out in Part IID2, of this opinion. *See also* Model Penal Code § 2.04(3)(b) (P.O.D. 1962).

[8] Barker Br. at 31.

was that Hunt possessed the legal prerequisites to conduct a search—either probable cause or a warrant."[9] In the alternative, they contend that Hunt's inducement estops the government from prosecuting under entrapment principles. I turn to the entrapment question first.

A. *Entrapment*

The defense of entrapment, developed as a construction of legislative intent, has been evolved for the case of an otherwise innocent person who has been induced to commit a crime by a law enforcement agent whose purpose was prosecution. Recognition of the defense works as an estoppel on the government, preventing it from reaping the benefits of the prosecution and conviction it sought to obtain by unconscionable means.[10]

The entrapment rationale is wholly inapplicable to this case. In recruiting Barker and Martinez, Hunt was not

[9] Barker Br. at 31-32.

[10] *See,* Hughes, C.J. in Sorrells v. United States, 287 U.S. 435, 448 (1932): "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. . . . This, we think, has been the underlying and controlling thought in the suggestions in judicial opinions that the Government in such a case is estopped to prosecute or that the courts should bar the prosecution."

Sorrells was followed in Sherman v. United States, 356 U.S. 369 (1958), and United States v. Russell, 411 U.S. 423 (1973). In *Sherman,* 356 U.S. at 372 Warren, C.J., in a passage quoted in part) with approval of Rehnquist, J. in *Russell,* 411 U.S. at 434, stated: "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. . . . Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations."

acting as a law enforcement official seeking to induce their participation in order to have them prosecuted and punished. He instead sought their aid for other governmental ends which his unit judged best served by illegitimate invasion of the rights of others. The true entrapment defense seeks to prevent government officials from realizing benefits from unlawful inducement, and thereby to deter official illegality. Extension of the defense to reach Hunt's inducement of Barker would serve to reinforce the illegal conduct of the government agent, who could then delegate the "dirty work" to private citizens shielded from responsibility by the defense that they had been recruited by a government agent.[11]

B. *The Claim of Mistake of Fact*

It is settled doctrine that an honest mistake of fact generally negatives criminal intent, when a defendant's acts would be lawful if the facts were as he supposed them to be.[12] This is considered a matter of essential fairness.[13] Even had the facts been as Barker and Martinez claim now to have supposed them, however, their Fielding break-in would still have contravened the clear requirements of the Fourth Amendment.

[11] Congress is presently considering a major extension of the entrapment defense in the bill proposed to codify and revise title 18, S. 1, § 551, 94th Cong., 1st Sess. (1975). As of the present, it is not known or knowable whether or in what form this proposal will be passed, and what Congress may contemplate as to cases previously tried.

[12] *See, e.g.,* United States v. Feola, 420 U.S. 671, 686 (1975); 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 157 (1957); G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART §§ 52-74 (2d Ed. 1961); *Model Penal Code* § 2.04 (1) (P.O.D.) (1962).

[13] *See* H. M. Hart, Jr. "The Aims of the Criminal Law", 23 LAW AND CONTEMPORARY PROBLEMS 401, 414 (1958). Cf. Morissette v. United States, 342 U.S. 246 (1952), and discussion in note 49 *infra.*

Classifying mistakes as either of fact or of law is not always an unambiguous task.[14] At trial, defendants offered an instruction that rather elusively muddled the two types of mistakes, and set them in an incorrect context as to the "specific intent" required for the crime.[15] The brief before this court attempts to correct

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[14] Generally, Glanville Williams distinguishes between them as follows: "[A] fact is something perceptible by the senses, while law is an idea in the minds of men." WILLIAMS, CRIMINAL LAW, THE GENERAL PART (2d ed., 1961), § 100, p. 287.

[15] Defendants' proposed instruction read: "You have heard evidence during the course of the trial pertaining to the state of mind of certain of the defendants at the time they agreed to participate and thereafter did participate in the September 3, 1971 entry of the office of Dr. Lewis J. Fielding. I instruct you that a defendant's motives in committing acts which the law forbids are not germane to whether an offense has been committed. However, since specific intent is an essential element of this offense, if a defendant acted out of a good faith belief that what he was doing was with authority of law and not in violation of the law, that is a defense to the crime charged, even if that sincere belief that his actions were lawfully authorized was erroneous."

"This is not to say that a mistake of law on the part of a defendant would constitute a defense to the crime charged. Neither ignorance of the law nor mistake of law would excuse the criminal conduct in this case. However, if actions are taken as the result of mistake of fact, as opposed to ignorance or a mistake of law, then the defendant has not formed the requisite intent for the crime charged. Accordingly, if you find that a defendant believed he was acting out of a good faith reliance upon the apparent authority of another to authorize his actions, that is a defense to the charge in Count I, provided you find that such a mistake by a defendant was made honestly, sincerely, innocently and was a reasonable mistake to make based upon the facts as that defendant perceived them." Barker App. 104-05.

To the extent defense counsel was of the view, as appears from the third sentence of his proposed instruction, that a good faith mistake of law negatives the specific intent required for the crime, this is not sound. See Sec. IIE of this

that prior lack of clarity by advancing the proffered defense with a closer attention to the discrete policies underlying the mistake of fact and mistake of law defenses. It may be convenient to take up the appellants' defense in terms of the recognized doctrinal distinctions before turning to the applicability of exceptions.

For purposes of this appeal it can be assumed that Barker and Martinez undertook the Fielding break-in while believing that the ultimate "target" was a foreign security risk for the United States. The defendants do not simply claim that they were factually mistaken about the purpose of their mission, however; they also urge that their error in believing that Hunt was a "duly authorized" agent was a factual error. Although defendants claim to maintain a distinction between mistake of fact and mistake of law, this contention entirely erodes the distinction. Defendants did not claim, or offer to prove a belief, that the President or Attorney General personally authorized the break-in; nor did they seek to advance any other specific factual basis for the belief that Hunt was "duly authorized." They certainly did not offer to prove that they believed John Ehrlichman "expressed or implied that the break-in of Dr. Fielding's office was legal under a national security rationale." (Merhige, concurring at 8). They did not seek outside advice about the factual requirements necessary for such an undertaking. The appellants do not claim they mistakenly believed they were acting under a warrant. Nor do they claim any other representation of fact, express or implied, or mistake of fact.

Martinez says he believed that Hunt was still employed by the CIA. He has apparently put himself in a no-lose position on this point, for when his CIA case

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opinion and Sec IIA of our opinion in U.S. v. Ehrlichman, issued today; United States v. Guest, 383 U.S. 745 (1966); Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

officer replied to his inquiry that Hunt was not then employed by CIA, he assumed this answer was a ruse or cover. But this mistake of fact—whether reasonable or not—was irrelevant, for even if Hunt had then been employed by CIA, his employment would not have validated the break-in and search.

At bottom, the defendants' "mistake" was to rely on Hunt's White House and CIA connections as legally validating any activities undertaken in the name of national security. They had been told that the matter was something that could not be handled by the FBI because of court decisions or by the CIA because of its limited jurisdiction. Martinez conceded in testimony that he was aware that the operation might have been illegal for a "normal citizen" (Tr. 2170). Barker and Martinez did not consider themselves "normal" because of their putative status as CIA-White House operatives. Their mistake as to who or what the law authorized or required cannot be repackaged as a mistake of "fact" that Hunt had been duly authorized.

It can be assumed for present purposes that defendants mistakenly believed they were entering Dr. Fielding's office in order to get information on some other person who was a "traitor." However, their actions taken pursuant to that mistaken belief did not conform with the law's requirements. The fundamental right to be free from warrantless physical searches has been clear since *Boyd v. United States*[16] recognized that such cases as *Entick v. Carrington*[17] so intensely affected the framers that those cases have long been taken "as sufficiently

[16] 116 U.S. 616 (1886).

[17] 95 Eng. Rep. 807 (1765). Lord Camden upheld damages against Lord Halifax, the Secretary of State who issued the general warrant to seize papers in a case of seditious libel, holding this had never been authorized by a court, other than Star Chamber, and was not a valid justification for a trespass.

explanatory of what was meant by unreasonable searches and seizures."[18] Even when the Executive acts to avert foreign security dangers, no Federal judge, indeed no Department of Justice submission, has ever suggested that action otherwise clearly prohibited by the Fourth Amendment would be valid in the absence of explicit authorization by the President or Attorney General. No generally delegable power to authorize such searches is reconcilable with the requirements of the Fourth Amendment.[19]

On the separate issue of whether physical searches can properly be included in a foreign security exception to the warrant requirement, the Special Prosecutor says No, while the Attorney General has filed a short memorandum saying Yes, if specifically authorized by the President or the Attorney General.[20] The fact that defendants do not assert a belief that the President or Attorney General authorized their violation of Dr. Fielding's fundamental right to be free of warrantless government forays into his office takes this case outside the mistake of fact defense, for whatever defendants' other beliefs as to the facts, they would not, if true, establish exculpation.

[18] 116 U.S. at 627.

[19] See discussion in the companion opinion of United States v. Ehrlichman at Sec. IIB1, and the District Court's reliance on the defendants' failure to allege Presidential or Attorney General authorization, 376 F. Supp. at 34.

[20] The fact that the Attorney General has recently—and so far as we are aware for the first time—made the claim that there is a "national security" exception that would permit physical intrusion in a citizen's home or office on specific approval of the President or Attorney General, even in the absence of a warrant, does not mean that the law on this position is now to be regarded as clouded with doubt so as to remove such actions from the scope of section 241.

In an earlier case involving these same defendants, and roughly the same defense as that advanced here, Judge Wilkey rejected the argument that "an error as to the legality of a particular activity, even if based upon the assurances of a governmental official" can be treated as a mistake of fact. He recognized the importance of the issue, for a mistake of fact defense would justify conduct whenever the mistake was honest whether reasonable or not, while the mistake of law defense, if held applicable, justifies conduct only if the mistake is reasonable. *United States v. Barker*, (dissent) 168 U.S.App.D.C. 312, 514 F.2d 208, 264-68 & n.76 (1975). I subsequently consider whether the mistake of law defense should be expanded to reach this case. But certainly this should not be done behind the screen that what is involved is a mistake of fact. Defendants cannot avoid the limitations that have historically shaped exculpation because of legal mistake, by characterizing as factual error their belief that a generalized aura of executive branch authorization warranted their nighttime intrusion.

C. *Mistake of Law—Generally*

Viewed as a mistake of law, the defense raised by defendants requires us to confront a fundamental tension in our criminal law. The criminal law relies in general on the concept of culpability or blameworthiness as a prerequisite to guilt, expressed as a requirement of *mens rea*.[21] The Supreme Court has, however, rejected Black-

[21] H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 112-21 (1968), explains the use of culpability as an "appropriate criterion for limiting the reach of state intervention", "transcend[ing a] calculus of crime preventing." *But see* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 77-83 (2d ed. 1960), concluding that even in the earliest cases *mens rea* was concerned with the intentional doing of a wrongful act and not a general notion of moral blameworthiness; Seney, " 'When

stone's formulation that a "vicious will" is necessary to constitute a crime, see *Lambert v. California*, 355 U.S. 225, 228 (1957), and as a society we have stopped short of requiring a subjective behavioral assessment of each offender's individual stock of knowledge about the law and its applicability.[22] Instead, "the rule that 'ignorance of the law will not excuse' . . . is deep in our law." *Lambert v. California*, 355 U.S. at 228, quoting *Shelvin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910). The Supreme Court has generally refused to recognize a defense of ignorance of, or mistake as to, the requirements of the law violated, even when the mistake refutes any subjective moral blameworthiness in the offender. *See, e.g., United States v. Park*, 421 U.S. 658 (1975); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971). *United States v. Freed*, 401 U.S. 601 (1971); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943).[23] Similarly,

Empty Terrors Overawe'—Our Criminal Law Defenses," 19 WAYNE L. REV. 947, 969 (1973), conceptualizing criminal law as imposing a positive duty upon individuals to refrain from antisocial conduct.

[22] *But see* Hall and Seligman, "Mistake of Law and *Mens Rea*," 8 U. CHI. L. REV. 641 (1941). (Hereinafter cited as Hall and Seligman). Of course, totally subjective assessments of an accused's state of mind can never be fully realized. For example, a finding of the subjective intent required for a first degree murder conviction may be and frequently is based on objective inferences from evidence other than direct evidence of the state of mind.

[23] Only where scienter is "historically required", as in embezzlement or larceny (see Morissette v. United States, 342 U.S. 246, (1951), discussed in U.S. v. Freed 401 U.S. at 607 n.13), or where the circumstances requiring the law's application do not "alert the doer to the consequences of his deed" (*Lambert*, 355 U.S. at 228) has ignorance of the law been recognized by the Supreme Court as an excuse.

the A.L.I.'s Model Penal Code § 2.02(9) defines the requirements of culpability so that "neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense unless the definition of the offense or the Code so provides." [24]

The general principle that rejects the defense of ignorance of the requirements of the criminal law, or of mistake as to those requirements, is not a casual or happenstance feature of our legal landscape. It formed a part of English and canon law for centuries and all the time with recognition that it diverged from an approach of subjective blameworthiness.[25] Its continuing vitality stems from preserving a community balance, put by Holmes as a recognition that "justice to the individual is rightly outweighed by the larger interests on the other side of the scales." [26] Great minds like Holmes and Austin have struggled with the tension between individual injustice and society's need and have concluded that recognition of the mistake of law defense would encourage ignorance rather than a deter-

[24] (P.O.D. 1962). *See also* S. 1, *supra* note 11, § 303(d)(1) "Existence of Offence—Proof of knowledge or other state of mind is not required with respect to: (A) the fact that particular conduct constitutes an offense or is required by or violates a statute or a regulation, rule, or order issued pursuant thereto; (B) the fact that particular conduct is described in a section of this title; or (C) the existence meaning, or application of the law determining the elements of an offense. This careful specification of the elements of an offense is consistent with "[t]he modern practice in drafting penal legislation . . . to specify defenses when intended." United States v. Moore, 158 U.S.App.D.C. 375, 412, 486 F.2d 1139, 1177, cert. denied 414 U.S. 980 (1973).

[25] *See* Hall & Seligman's summary, *supra* at 643-46.

[26] Holmes, *The Common Law* 48 (1881).

mination to know the law, and would interfere with the enforcement of law, because the claim would be so easy to assert and hard to disprove.[27]

In some aspect the doctrine may be viewed as a doctrine of negligence, holding individuals to minimal conditions of responsibility and making acting without legal knowledge blameworthy for the failure to obtain that knowledge.[28] Hall suggests in addition that the rationale can be expressed in terms of ethical policy—that the criminal law represents certain moral principles and that to recognize ignorance or mistake of law as a defense would contradict those values.[29] Still, it must in the last analysis be recognized that at its core, the basic mistake of law doctrine imposes liability even though defendant acted in good faith and made a "reasonable" mistake. Otherwise, criminal statutes would be in suspense on any point not authoritatively settled.[30] In a particular case adherence to a generally formulated

[27] As to the doctrinal support for their positions, an excellent summary is presented in Hall & Seligman, *supra* at 646-651.

[28] Hart, "The Aims of the Criminal Law," 23 LAW AND CONTEMPORARY PROBLEMS 401, 413 (1958).

[29] "The criminal law represents an objective ethic which must sometimes oppose individual convictions of right. Accordingly, it will not permit a defendant to plead, in effect, that although he knew what the facts were, his moral judgment was different from that represented in the penal law." Hall, "Ignorance and Mistake in Criminal Law," 33 IND L.J. 1, 21 (1957), quoted in Report of the Senate Committee on the Judiciary, Criminal Justice Codification, Revision and Reform Act of 1974, Vol. II, p. 96.

[30] It would fairly be argued that no liability attaches for *e.g.*, action taken under a "reasonable", though erroneous, forecast of how far the courts might go in confining a statute through the doctrine of strict construction. Litigation could come to depend not on what the statute meant, but on the reasonableness of a legal view of its meaning.

rule may seem to work injustice, but the jurists pondering the general doctrine have both deemed such individual hardships outweighed by the common good, and have taken into account that certain features of the overall system of criminal justice permit amelioration and relief.[31] These flexible opportunities for mitigating the law's impact—through prosecutorial discretion,[31a] judicial sentencing, and executive clemency—avoid the necessity of bending and stretching the law, at the price of undermining its general applicability.

Every mature system of justice must cope with the tension between rule and discretion. Rules without exceptions may grind so harsh as to be intolerable, but exceptions and qualifications inflict a cost in administration and loss of control. The balance struck by the doctrine with which we are now concerned provides for certain rigorously limited exceptions (inapplicable to

[31] If the social harm in a particular case is slight and the ignorance of the law on the part of the offender is fairly obvious, the state may wisely refrain from prosecution in his case. In certain other cases ignorance of law may be considered by the court in mitigation of punishment, or may be made the basis of an application for executive clemency. But if such ignorance were available as a defense in every criminal case, this would be a constant source of confusion to juries, and it would tend to encourage ignorance at a point where it is peculiarly important to the state that knowledge should be as widespread as is reasonably possible.

R. PERKINS, CRIMINAL LAW 925 (2d ed. 1969). (footnotes omitted).

[31a] The Justice Department decision against prosecuting Richard Helms may be a sound example of prosecutorial discretion shielding against the cut of the law. It should be noted that unlike the defendants in this case, Helms arguably acted in obedience to a duty imposed by statute, and thus might have come within the compass of a mistake of law defense grounded in the actor's being under a duty to act.

defendants' claim) but otherwise leaves amelioration of harsh results to other parts of the system of justice. In my view, history has shaped a rule that works, and we should be slow to tinker. Consequently, defendants here must be held to a responsibility to conform their conduct to the law's requirements. To hold otherwise would be to ease the path of the minority of government officials who choose, without regard to the law's requirements, to do things their way, and to provide absolution at large for private adventurers recruited by them.

D. *Exceptions to the Mistake of Law Doctrine*

I do not discount defendants' claims that their background, and particularly their previous relations with the CIA [32] and Hunt explains their good faith reliance on Hunt's apparent authority and their consequent failure to inquire about the legality of the activities they were to undertake on his request.[33] I feel compassion for men who were simultaneously offenders and victims, and so did the trial judge when it came to sentencing. But testing their special circumstances against analogies they rely on to project

[32] However, the CIA's statutory authority does not extend to domestic intelligence activity. 50 U.S.C. § 403(d)(3) (1970).

[33] Although Barker and Martinez are American citizens, they are in a sense arguing that they could not be expected to make the right judgments about the requirements of American law because they were accustomed to Cuba's more authoritarian culture. *See* Bazelon, J. concurring in United States v. Barker, 514 F.2d at 235 n.38. However under American jurisprudence an alien or naturalized citizen status does not excuse compliance with the criminal law. *Cf.* United States v. De La Garza 149 U.S.App.D.C. 200, 462 F.2d 304 (1972).

a mistake of law defense, leads me to reject their claim to be relieved of personal accountability for their acts.

1. *Claim of Good Faith Reliance on an Official's Authority*

Appellants invoke the acceptance of good faith reliance defenses in the Model Penal Code. However, the American Law Institute carefully limited the sections cited to persons responding to a call for aid from a police officer making an unlawful arrest,[34] and to obeying unlawful military orders,[35] and specifically rejected the defense for other mistake of law contexts.[36] In both instances, the

[34] *See* e.g., Model Penal Code § 3.07(4) (P.O.D. 1962):

(4) *Use of Force by Private Person Assisting an Unlawful Arrest.*

(a) A private person who is summoned by a peace officer to assist in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that he does not believe the arrest is unlawful.

(b) A private person who assists another private person in effecting an unlawful arrest, or who, not being summoned, assists a peace officer in effecting an unlawful arrest, is justified in using any force which he would be justified in using if the arrest were lawful, provided that (i) he believes the arrest is lawful, and (ii) the arrest would be lawful if the facts were as he believes them to be.

[35] *See* Model Penal Code § 2.10 (P.O.D. 1962). (*See also* WILLIAMS CRIMINAL LAW § 105, 296-301; United States v. Calley 22 U.S.M.C.A. 534 (1973).

[36] When § 3.07(4) does not specifically apply, § 3.09(1) withdraws any justification defense to the use of improper force where the actor's "error is due to ignorance or mistake as to the provisions of the Code, any other provision of the criminal law or the law governing the legality of an arrest or search." The Commentary explained that provision as dealing with a "body of law [which] is not stated in the Code and may not appear in the form of penal law at all. It seems, clear, however, that the policy which holds mistake of penal law to be immaterial applies with no less force to the law of arrest or search." A.L.I. Model Penal Code § 3.09(1) comment referring to § 3.04(1) comment (Tent. Draft. No. 8, 1958), at 18.

A.L.I. recognizes limited curtailment of the doctrine excluding a mistake of law defense on the ground that the actor is under a duty to act[37]—to help a police officer in distress to make an arrest when called upon, or to obey military orders. In each case, society has no alternative means available to protect its interest short of imposing a duty to act without a correlative duty to inquire about the legality of the act.[38] Punishing an individual for failure to inquire as to the lawful basis for the officer's request would frustrate the effective functioning of the duly constituted police (and military) force and in its operation on the individual would compel a choice between the whirlpool and the rock.[39]

There is no similar incapacity of the government to act to protect its ends when a citizen takes action when he is under no duty to do so. Thus under the Model Penal Code, a citizen who volunteers to assist another citizen, or volunteers to assist a police officer in making

[37] An analogous defense under proposed S. 1 is § 541 (Exercise of Public Authority), which justifies conduct by private individuals done at the direction of a public servant where the conduct was required or authorized by law. Because their conduct was neither required nor authorized, Barker and Martinez fall outside the scope of this proposed exception.

[38] A similar rationale underlies the exception for reliance on government authority when acting under a public duty. *See* Model Penal Code § 3.03 (P.O.D. 1962).

[39] Even under circumstances of conflicting obligations, the reasonableness of a soldier's obedience to an unlawful order is tested against the objective standard provided by "a man of ordinary sense and understanding." 22 U.S.C.M.A. *supra*, at 542-43. See also footnote 31a *supra*.

an unlawful arrest, cannot avail himself of the defense—available to a person responding to an officer's call—that he participated without making an inquiry as to whether the arrest was lawful. The volunteer is exculpated only if he believed that the arrest was lawful *and* believed in the "existence of facts which, if they existed, would render the arrest valid." [40] Thus, even if private citizen intervention appears socially desirable in a particular case, the citizen's scope of action and protection in the event of mistakes are narrow, because overall forceful citizen enforcement of the law is susceptible of abuse [41] and mischief.

Barker and Martinez were under no tension of conflicting duties comparable to that experienced by a soldier or citizen responding to orders. They had and claim no obligation to aid Hunt. Nor did they have a belief of fact rendering their voluntary assistance lawful within § 3.07(4), *supra* note 33. Nor is there a compelling social interest to be served in allowing private citizens to undertake extra legal activities, acting simply on the word of a government official. The purposes of the law in rejecting such a defense are underscored by the very kinds of extra-governmental, outside-normal-channels conduct that Barker and Martinez engaged in here. Government officials who claim to be seeking to implement the ends of government by bypassing the agencies and personnel

[40] A.L.I. Model Penal Code, § 3.07(4)(b), see note 33 *supra;* Comment (Tent. Draft No. 8 p. 65 (1958). *Cf.* Proposed S. 1 § 544(b) (similar provision for recognizing defenses based on justifiable conduct predicated on a mistake about the factual situation).

[41] *See e.g.*, U.S. v. Hillsman, 522 F.2d 454, (7th Cir. 1975), holding that defendant's attempted citizen's arrest of a fleeing felon was improper under Indiana law because validity of such an arrest rests on whether a felony (a question of fact and of law) had in fact been committed by the arrestee, and no felony had in fact been committed.

normally responsible and accountable to the public transmit a danger signal. Barker and Martinez acted to help Hunt on his explanation that he sought their recruitment because the FBI's "hands were tied by Supreme Court decisions and the Central Intelligence Agency didn't have jurisdiction in certain matters." [42] There is reason for the law to carve out limited exceptions to the doctrine negating defenses rooted in mistake of law, but the pertinent reasons have minimal weight, and face countervailing policies, when they are invoked for situations that on their face are outside the basic channels of law and government—in this case, requests for surreptitious or, if necessary, forcible entry and clandestine files search. These are plainly crimes, *malum in se*, unless there is legal authority. Citizens may take action in such circumstances out of emotions and motives that they deem lofty, but they must take the risk that their trust was misplaced, and that they have no absolution when there was no authority for the request and their response. If they are later to avoid the consequences of criminal responsibility, it must be as a matter of discretion. To make the defense a matter of right would enhance the resources available to individual officials bent on extra-legal government behavior. The purpose of the criminal law is to serve and not to distort the fundamental values of the society.

2. *Exception for Official Misstatements of Law*

Although defendants relied on the analogy to a police officer's request for assistance, Judge Merhige votes to reverse on the ground that appellants could claim as a defense that a citizen has a right to take action in reliance on a government official's assurance that such action is permissible. The Model Penal Code has addressed itself to that broad problem, and has approved a defense

[42] Barker, Tr. 2197.

that is narrowly confined in order to protect social interests.[43] Its provision yields no excuse for defendants' conduct. Section 2.04(3) of the Code provides a carefully and properly drawn recognition of a defense based on reasonable reliance on a statute, judicial decision, administrative order or "an official interpretation of the public officer or body charged by law with responsibity for the interpretation, administration or enforcement of the law defining the offense." Mainly directed to the *mala prohibita* offenses, the categories protected "involve situations where the act charged is consistent with entire law-abidingness of the actor, where the possibility of collusion is minimal . . ."[44]

The section contemplates both accountability and responsible action on the part of the government official giving advice about the law. But defendants do not claim they received any advice, either express or implied, from Ehrlichman, and Hunt had only an *ad hoc*, undefined position in the White House.[45] He had no on-line enforcement or interpretative powers or responsibilities. His undifferentiated power stemmed solely from membership in a large White House bureaucracy.[46] The

[43] A similar approach appears in § 552 of S.1, *supra* note 11.

[44] Model Penal Code, Tentative Draft #4 Commentary at 138 (1955).

[45] The Room 16 unit did not even have an Executive Order formally creating it or endowing it with any powers. *Cf.* the classified Executive Order used to create the National Security Agency (Nov. 4, 1952, U.S. Govt. Org. Manual 185-86 (1969-70)), discussed in Walden, "The CIA: A Study in the Arrogation of Administrative Powers" 39 GEO. WASH. L. REV. 66, 67 (1970).

[46] The way that bureaucracy acquires power and handles its conflicts with agency personnel and policy is examined at length in Thomas, "Presidential Advice and information: Policy and Program Formulation, 35 LAW AND CONTEMPORARY PROBLEMS 540 (1970).

potential for official abuse of power would be greatly magnified if such a government official can recruit assistance from the general public, constrained neither by accountability guidelines guiding agency action under statutorily mandated powers, nor by the recruited citizen who, under the defendants' formulation, would be under no duty to inquiry about the legality of the official's request.[47]

To stretch the official misstatement of law exception for the facts of this case is to undercut the entire rationale for its recognition as an exception. The Model Penal Code hedges in the defense to permit reliance only on an "*official interpretation* of the public officer . . . *charged by law* with responsibility for the interpretation, administration or enforcement of the *law defining the offense.*" (emphasis added). Certainly Hunt cannot sensibly be described as having been charged by law with responsibility for interpreting or enforcing either § 241, or the Constitution from which the violations of § 241 in this case sprang. Nor can it be said in any meaningful sense that he had the power to provide an official interpretation of the law. These restrictions on the applicability of the official statement exception did not arise haphazardly; they were deliberately drafted to allow, and indeed to promote, good faith reliance on official pronouncements with objective indicia of reliability—those made by officials specifically charged with interpreting or enforcing the specific law defining the specific offense charged against the defendant. A defense so confined has values for the law: It avoids punishing those who rely on a crystallized position taken by the

[47] The potentially broad range of illegal activities that a government official might request a private citizen to do, would make it impossible to rely on the educational value that normally inheres when mistake of law is recognized as an excuse in one case that serves to define the law for similarly circumstanced offenders in the future. *See, e.g.*, Fletcher, "The Individualization of Excusing Conditions," 47 So. CAL. L. REV. 1269, 1304-05 (1974).

officer or body charged by statute with interpreting the law in a particular area.[47a] The officer's position in a channel of authority is readily identifiable; any mistakes he makes can be remedied by readily perceived and structured avenues of relief. There is no opening the door to justification for serious offenses based on unrecorded discourse from someone who has an undefined but high-sounding berth in the government.

The "official interpretation" defense thus structured is a functional analogue of the defenses of reliance on a statute, judicial decision or administrative order. It is justified by its twin underlying assumptions that the official is one to whom authority has been delegated to make pronouncements in a field of law, and that the authority can be held accountable by explicitly grounding it in the hands of an identifiable public official or agency. So grounded, the interest of both private citizens and government is served by protecting actions taken in reliance on that interpretative authority. But *none* of these safeguards of regularity is present in this case. A staff man or even a lower echelon official of the White House may be taken as a man of presumptive standing and even influence, but not seriously as a source of official interpretation of law, much less of such matters as the validity of a stealthy breaking and entering. Even cases postulating a national security exception for wiretaps have never suggested more than that the President or the Attorney General could have authority to evaluate and authorize an exception. No claim of Presidential or Attorney General authorization has been made in this case. The official misstatement of law defense embodies a fundamental requirement that the erroneous interpretation be made by an official in fact possessing the power to make

[47a] *Cf.* National Automatic Laundry and Cleaning Council v. Shultz, 143 U.S.App.D.C. 274, 287-289, 443 F.2d 689, 702-04 (1971).

a binding interpretation; it is wholly inapplicable to a case like this, of a claim of reliance on a government official in an area in which he has no power to interpret. And it is blatant incongruity to stretch an escape clause for mistakes of law arising in the innately public business of official interpretations of law to immunize a secret conference for planning a stealthy entry into a private home or office.

3. *The Inapplicability of Other Exceptions*

While a mistake of law may negative a specific element of certain crimes,[48] or may be accepted where the mistake pertains to a violation of purely civil law as contrasted with the requirements of the criminal law,[49] none of these carefully wrought exceptions have application to the case at bar. Defendants' mistake of law did not pertain to some rule irrelevant to or remote from the criminal law. Nor does section 241 recognize a mistake of law defense or require a specific intent like the statute at issue in *People v. Weiss*, 276 N.Y. 384, 12 N.E.2d 514 (1938), punishing a "willful" seizure of a person with "intent to [act], without authority of law."

[48] *See e.g.* Mistake § 521 in S.1; Model Penal Code § 2.04 (P.O.D. 1962). The possibility of a definition of particular crimes to permit exculpation by mistake of law does not contradict the general rule denying exculpation. "The prevailing general rule for criminal responsibility is that, unless the legislature indicates its intention to make it so, ignorance or mistake of law is no defense." Report of the Senate Committee on the Judiciary, Criminal Justice Codification, Revision and Reform Act of 1974, Vol. II, p. 94.

[49] *See e.g.*, WILLIAMS, CRIMINAL LAW: THE GENERAL PART, § 117, Fletcher, "The Individualization of Excusing Conditions, 47 *So. Cal L. Rev.* 1269 (1974) at 1272. Williams suggests that a mistake as to purely "civil" law is exculpatory while a mistake as to the "criminal" law is not. *See* G. Williams, *supra* §§ 107-117, p. 304-451. Hart, *supra* at 431 n.70 explains Morissette v. United States, 342 U.S. 246 (1951), as a "claim of right" civil law mistake.

E. *The "Specific Intent" Requirement of the Civil Rights Offenses*

This brings me to the question whether the civil rights offenses involved here are of such a character, either in terms of required intent or affirmative defense, as to make available an extension of criminal defenses to include mistake of law. I conclude, on the contrary, that this consideration reinforces the rejection of the profferred defense.

The court is dealing here with violations of civil rights. We all agree that "the law is clear that Dr. Fielding's Fourth Amendment rights were breached when the defendants broke into and searched his office without the requisite judicial authorization" and that they acted with "a purpose to invade constitutionally protected interests." (*Ehrlichman* slip at 32). Unless we are willing to undercut criminal enforcement of the civil rights offenses, it is entirely impermissible to stretch doctrines of mistake of law to reach the result of excusing that violation of Fourth Amendment rights. The majority excuses defendants' conduct on their contention of mistaken reliance on official lawlessness—even though conspiracy for illegal goverment purposes with government officials is the gravamen of the offenses charged. What the reversals accomplish is an erosion of pertinent Supreme Court rulings rejecting contentions based on "specific intent."

Conviction under Section 241 requires that the offender acted with a "specific intent" [50] "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ." This does not mean that he must have acted with subjective

[50] *See, e.g.*, United States v. Guest, 383 U.S. 745, 753-54 (1966).

awareness that his action was unlawful; nor need the defendant have thought in constitutional terms while acting. *See, e.g., Screws v. United States*, 325 U.S. 91, 104-07 (1945). It is enough that the constitutional right is clearly defined and that the conspirators intend to invade interests protected by the Constitution.[51]

In essence, defendants Barker and Martinez claim that the destructive social impact wrought by their invasion of another's civil rights is exonerated by the law so long as an individual is acting at the request of a government official and on his implication that he has legal authority. The price to society of tolerating reliance on the very official misconduct § 241 was directed against, forces us to reject defendants' argument.[52] As the Supreme Court made clear in *Screws*,[53] the scope and significance of the all-important civil rights criminal statutes are not to be cabined or cut down, either by expanding scienter requirements to include knowledge of law or by enlarging defenses based on ignorance or mistake of law. A private citizen must start with a beginning point in his understanding of what the law requires. Breaking and entering a home or office is *malum in se*—a gross and elementary crime when done for personal

[51] As our companion opinion in United States v. Ehrlichman illustrates, Dr. Fielding's right to be free of a warrantless search was clear at the time of the break-in.

[52] *See* United States v. Konovsky, 202 F.2d 721, 730-31 (7th Cir. 1953):

> If a police officer acts intentionally under color of his office to subject a citizen to deprivation of his constitutional rights, he cannot justify his action in that respect by orders from his superiors . . . [A]ny instruction to the jury must carefully point out the distinction between the duty of an officer to allow [sic] his superior's instructions in the performance of his duty and the equal duty not to aid and abet in the deprivation of citizens' rights.

[53] 325 U.S. 91 (1945).

reasons, a gross and elementary violation of civil rights when done with the extra capability provided by a government position. Defendants were charged and convicted of violating a clearly defined constitutional right.[54] They were not acting in an official law enforcement capacity. *Cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972).[55] Their defense instead reduces to an arguable but untested speculation that their otherwise unlawful behavior would be vindicated by a foreign security exemption to the Fourth Amendment's protections. In regard to subjective "good faith," they are indistinguishable from any other criminal defendant who deliberately breaks the law in the mistaken expectation that he can assert a constitutional defense at trial or one who is civilly disobedient because his framework for moral action does not coincide with his society's legal framework.[56] Such persons frequently act on a high plane of patriotism, as they view it, but that does not allow them to proceed in ignorance or disregard of the requirements of law.[57]

[54] See part II of this opinion.

[55] The *Bivens* court balanced the need to protect agents' lives in the course of their duties with the citizens' constitutional rights and held that "it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and search" to a damage action based on unconstitutional search and seizure. 456 F.2d at 1348. Although it is not clear that recognized civil defenses should be automatically applied to the criminal law context (*see e.g.* O'Shea v. Littleton, 414 U.S. 488, 503 (1974); Imbler v. Pachtman, 96 S.Ct. 984 (1976)), the defense recognized in *Bivens* does not in any case aid defendants here. The *Bivens* defense is applicable in an official law enforcement context where the complex law of probable cause must be applied to widely differing congeries of facts; by contrast, the law governing search and seizure without a warrant or Presidential/Attorney General approval is clear and plainly applied to prohibit the conduct Barker and Martinez engaged in. *See also* Wood v. Strickland, 420 U.S. 308, 322 (1975) (on remand, Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975) holding a school board member in a 42 U.S.C. § 1983 (1970) action to a standard of conduct based "on knowledge of the basic, unquestioned constitutional rights of his charges." Barker and Martinez had a similar responsibility to know the law.

[56] *See, e.g.*, United States v. Cullen, 454 F.2d 386, 392 (7th Cir. 1971) ("proof of motive, good or bad, has no relevance to [proving requisite intent]"); United States v. Malinowski, 472 F.2d 850, 856, (3d Cir.) *cert. denied*, 411 U.S. 970 (1973) ("We agree with the district court that 'whatever motive may have led him to do the act is not relevant to the question of the violation of the Statute.' Were the state of the law otherwise, a defendant's transgressions would go unpunished so long as he proved a sincere belief in the impropriety of the statutory goal"); United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) *cert. denied* 397 U.S. 910 (1970). It has been suggested, but not as yet implemented, that defendants in test cases should be allowed to assert their good faith belief in the unconstitutionality of a law as a mistake of law defense. *See* Dworkin, "On Not Prosecuting Civil Disobedience," 10 *N.Y. Rev. of Books* 14 (June 6, 1968). One commentator dealing with assessing criminal responsibility of the political offender concludes, however, that considering motive as a factor in mitigation of sentence rather than as a exculpating excuse would be the "most pragmatic proposal" for dealing with such offenders. Note, Criminal Responsibility and the Political Offender, 24 American U. L. Rev. 797, 833 (1975).

[57] Barker and Martinez contend, as a separate point, that they lacked "specific intent" to violate a federal right of Dr. Fielding, because the warrantless entry and search of his office were only incidental to their primary purpose of photographing Daniel Ellsberg's medical file, an objective they characterize as at best a state offense outside the reach of section 241. The Supreme Court's most recent pronouncement on the requirements of section 241 in Anderson v. United States, 417 U.S. 211 (1974), makes clear that "if one of [the purposes of the conspiracy]—whether primary or secondary —be the violation of federal law, the conspiracy is unlawful under federal law."

III. Conclusion

I do not propose to consider whether appellants were unreasonable in accepting a particular view of the law. In the first place, Barker and Martinez do not urge as justification that they had a specific view of the law, but rather that they are entitled to absolution because they relied on a government employee's credentials and his assurance, by implication, that their action was lawful. Even so, one might well raise the question as to how appellants could reasonably believe that what they were doing was lawful when they were told they were called in because the action would have been unlawful for the F.B.I.

The ultimate point is that appellants' mistake of law, whether or not it is classified as reasonable, does not negative legal responsibility, but at best provides a reason for clemency on the ground that the strict rules of law bind too tight for the overall public good. Any such clemency is not to be obtained by tinkering with the rules of responsibility but must be provided by those elements of the system of justice that are authorized by law to adjust for hardship and to provide amelioration. We should refuse to cut away and weaken the core standards for behavior provided by the criminal law.[58] Softening the standards of conduct rather than ameliorating their application serves only to undermine the behavioral incentives the law was enacted to provide. It opens, and encourages citizens to find, paths of avoidance instead of rewarding the seeking of compliance with the

[58] My rejection of the defendants' mistake of law defense also leads me to reject defendants' contention that failure to present evidence on their claimed defense to the grand jury requires dismissal of the indictment. Nor is an indictment subject to dismissal because of challenges to the competency or sufficiency of the evidence before the grand jury. *See* United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359, 363-64 (1956).

law's requirements. The criminal law cannot "vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility. The most that it is feasible to do with lesser disabilities is to accord them proper weight in sentencing." [59]

The sentence performed its proper function here. Our system is structured to provide intervention points that serve to mitigate the inequitable impact of general laws while avoiding the massive step of reformulating the law's requirements to meet the special facts of one hard case. Prosecutors can choose not to prosecute, for they are expected to use their "good sense . . . conscience and circumspection" to ameliorate the hardship of rules of law.[60] Juries can choose not to convict if they feel conviction is unjustified, even though they are not instructed that they possess such dispensing power.[61] In this case, Barker and Martinez were allowed to testify at length about the reasons motivating their involvement in the Fielding operation. This was an exercise of discretion by the judge that gave elbow room to both defendants and jury.[62]

In sentencing Barker and Martinez after they were

[59] A.L.I. Model Penal Code § 2.09, Comment (Tent. Draft No. 10, 1960), at 6.

[60] U.S. v. Dotterweich, 320 U.S. 277, 285 (1943), *quoted in part in* United States v. Park, 421 U.S. 658, 669-70 (1975).

[61] *See* United States v. Dougherty, 154 U.S.App.D.C. 76, 473 F.2d 1113 (1972).

[62] While not strictly congruent with the law underlying the instructions later given to the jury it did not involve the judge in an affirmative mis-statement of the law. The extra latitude in terms of what may be presented to the jury may be viewed as a historic resonance in practice from the days when juries had the power to set punishment as well as to convict, and evidence was admissible at trial in mitigation of punishment. Williams, Criminal Law *supra* at 291.

convicted, to only three years probation, the trial judge made a subjective evaluation of the defendants' conduct in light of the goals of the criminal law.[63] Barker and Martinez's patriotic motives, good intentions, and prior experience with the CIA and Hunt must all have influenced the sentence imposed.[64] The trial judge exercised his sentencing power to distinguish, in terms of degree of moral guilt, between appellants Barker and Martinez and codefendant Ehrlichman. But sympathy for defendants, or the possibility that their mistake might be considered "reasonable" given their unique circumstances, must not override a pragmatic view of what the law requires of persons taking this kind of action. I come back —again and again, in my mind—to the stark fact that we are dealing with a breaking and entering in the dead of night, both surreptitious and forcible, and a violation of civil rights statutes. This is simply light years away from the kinds of situations where the law has gingerly carved out exceptions permitting reasonable mistake of law as a defense—cases like entering a business transaction on the erroneous advice of a high responsible official or district attorney, or like responding to an urgent call for aid from a police officer. I dissent.

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[63] I am well aware that there are differences between probation and acquittal—the judgment of leniency being made by a judge and not a jury and a felony conviction having possible collateral effects in such matters as voting and employment. But if the situation does not prompt a failure to prosecute, the possibility of suspension of imposition of sentence and probation remains an important amelioration that avoids a breach in the law's resolution of interests.

[64] Establishment and vindication of the law need not be accomplished by a heavy penalty. *See e.g.*, Hall and Seligman, *supra* at 650; Note, Political Offenders, *supra* at 828-832.

Moreover, the trial judge took account of sentence served for the Watergate break-in. (Sentencing Tr. p. 10). It is not uncommon for trial judges to provide for concurrent service of sentence on unrelated crimes; here, the confinement on the prior sentence had already terminated.

No. 76-383

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN D. EHRLICHMAN, PETITIONER,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether all elements of a violation of 18 U.S.C. § 241 were established where the government proved and the jury found beyond a reasonable doubt that the petitioner willfully and knowingly conspired to commit acts that constituted a plain violation of well-established Fourth Amendment rights and that the acts were committed for the purpose of invading the precise interests protected by those rights.

2. Whether government officials' entering the office and searching the files of a psychiatrist, without a warrant and in the absence of exigent circumstances, to secure confidential information on a patient, constituted a plain and undisputable violation of the Fourth Amendment, even if there were a national security justification, where the search and entry were not approved personally by the President or Attorney General.

3. Whether petitioner was deprived of a fair trial where the trial judge refused a transfer and continuance after determining, through individual questioning of prospective jurors, that it was possible to impanel a fair and impartial jury.

4. Whether petitioner was denied any discovery rights where no material or exculpatory evidence was withheld.

5. Whether petitioner was entitled to a severance where there was no substantial (and certainly no irreconcilable) conflict between his defense and those of his co-defendants.

6. Whether petitioner was entitled to process to compel the attendance of the President of the United States where the trial judge had propounded and the President had answered interrogatories on all relevant issues and the answers confirmed that the President's testimony would not be material.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the District of Co-

lumbia (Gesell, J.) of conspiring to violate the Fourth Amendment rights of Dr. Lewis J. Fielding by subjecting him to an unconstitutional search (18 U.S.C. § 241) and of making false material declarations to a grand jury (18 U.S.C. § 1623).[1] Petitioner was sentenced to serve from twenty months to five years imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. a1).

1. The Decision to Search Dr. Fielding's Office and Photograph His Private Files.

During the summer of 1971, following the publication of the Pentagon Papers, a decision was made to establish a unit in the White House, which later became known as the "Special Investigations" or "Room 16" unit, to investigate leaks of classified information (J.A. 360-61, 471, 512-13).[2] The unit was under the direct supervision of Egil Krogh and David Young, who reported to petitioner, then Assistant to the President for Domestic Affairs (J.A. 430-32, 471-72). It also was staffed, with the knowledge and approval of petitioner, by G. Gordon Liddy, a former FBI agent, and E. Howard Hunt, a former

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[1] Petitioner was convicted on two counts charging the making of false statements and acquitted on a third by the jury. The district judge granted petitioner's motion for a judgment of acquittal on a count charging him with making false statements to agents of the Federal Bureau of Investigation ("FBI") after the jury had returned a verdict of guilty.

[2] "J.A." refers to the Joint Appendix of petitioner and the United States in the court of appeals.

Central Intelligence Agency ("CIA") agent (J.A. 472, 509-13).

By July 1971, the unit had focused its activities on acquiring all possible information on Daniel Ellsberg, the suspected source of the Pentagon Papers leak (J.A. 362). As petitioner was informed, this included a decision to have the CIA prepare a psychological profile on Ellsberg (J.A. 665-69; G.X. 5, 6).[3] The unit also decided to try to obtain access to Ellsberg's private medical records, but Dr. Lewis J. Fielding, a psychiatrist who had treated Ellsberg, refused to be interviewed by the F.B.I. because of the doctor/patient privilege (Ellsberg's psychiatric records were sought to aid the CIA in developing its psychological profile to be available for public release, if necessary, to destroy Ellsberg's image.) (J.A. 289-301, 364-65, 433-34, 460-62, 473.)

In view of Fielding's refusal to talk to FBI agents, Hunt proposed to Krogh and Young that they carry out a "bag job" or "surreptitious entry" to obtain Ellsberg's psychiatric records (J.A. 366). Because Krogh and Young did not believe they had authority to approve such an operation, they raised the question with Ehrlichman on August 5. Ehrlichman was told that the FBI had been unsuccessful in interviewing Fielding and that, if the unit were to gain access to Fielding's files, it would have to conduct a covert or clandestine operation of its own.

[3] "G.X." refers to Government Trial Exhibit.

(J.A. 434A-34C, 463, 475-78, 967-69). Petitioner wanted to think about the proposal (J.A. 434B-480).

Shortly thereafter, the unit received the CIA's preliminary profile, which it considered superficial and unsatisfactory (J.A. 373, 435, 480). As a result, Krogh and Young recommended to petitioner "that a covert operation be undertaken to examine all the medical files still held by Ellsberg's psychoanalyst covering the two-year period in which he was undergoing analysis." The recommendation was followed by the words "Approve" and "Disapprove", each followed by a blank to permit petitioner to indicate his decision. Petitioner placed his initial "E" in the blank following the word "Approve" and wrote in the space below: "if done under your assurance that it is not traceable" (J.A. 681-82; G.X. 13).

2. Preparations for the Entry, Final Approval and the Break-In.

After receiving petitioner's approval, Krogh and Young instructed Hunt and Liddy to proceed with a feasibility study on the condition that the actual entry be conducted by persons who were not in the direct or indirect employ of the White House (J.A. 369-71, 484). Hunt recruited Bernard Barker, who had worked for him during the Bay of Pigs operation while Hunt was with the CIA, and (through Barker) Eugenio Martinez and Felipe De Diego to comprise the entry team (J.A. 374-79, 426). Hunt and Liddy subsequently went to California to con-

duct their feasibility study, gaining access to Fielding's offices through false pretenses to take reconnaissance photos (J.A. 382-90).

Meanwhile, Krogh and Young sent petitioner memoranda keeping him fully informed about all aspects of the Ellsberg investigation. These included a list of "Items to Discuss with Mr. Ehrlichman—August 23, 1971" in connection with a meeting with Ehrlichman on that date. "Special Project No. 1," which referred to the plan to examine the files of Ellsberg's psychiatrist, was the first item on that list. (J.A. 685, 441-43, 470, 508; G.X. 15, 16.) On August 25, 1971, Krogh and Young succinctly notified petitioner that "Hunt and Liddy have left for California" (J.A. 683-84; G.X. 14).

The following day Young sent petitioner another memorandum referring to the plan to examine Fielding's files and indicating that the fruits of the entry were to be used as part of a plan "to bring about a change in Ellsberg's image." The latter memorandum stated that "we have already started on a negative press image for Ellsberg" and added that "[i]f the present Hunt/Liddy Project #1 is successful, it will be absolutely essential to have an overall game plan developed for its use in conjunction with the Congressional investigation." (J.A. 686-91; G.X. 17.) Following Young's suggestion, Ehrlichman sent Charles Colson, Special Counsel to the President, a memorandum entitled "Hunt/Liddy Special Project #1" and stating: "On the assumption that the proposed undertaking by Hunt and Liddy would be carried out, and would be successful, I would appreciate receiving from you by next Wednesday a game plan as to how and when you believe the materials should be used" (J.A. 692-522; G.X. 18).[4]

On August 31, Krogh and Young called petitioner, who was vacationing at Cape Cod, to secure final approval for the operation. They told him that the investigators had returned from California and felt that the operation could be conducted with all conditions met. When both Krogh and Young said that they should go ahead with the operation, petitioner gave his approval and asked to be informed if anything substantial was discovered. (J.A. 447-49, 491-93).[5]

On the night of September 3, Barker, Martinez and De Diego broke into Dr. Fielding's offices and rifled through his locked file cabinets, but failed to locate Ellsberg's records. They left pills and materials strewn about the office to make the break-in appear to be the work of addicts searching for drugs. (J.A. 398-401, 416-21.)

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[4] Petitioner also arranged for Colson to obtain $5,000 in cash from private sources to finance the operation.

[5] Petitioner asserts that it is "uncontroverted from the record that [he] never contemplated any type of entry . . ." (Petition, p. 14). The district court's instructions, however, required the jury to find that petitioner knowingly joined the conspiracy aware that its purpose was to carry out a warrantless entry and search of Dr. Fielding's office. Petitioner did not challenge this aspect of the court's instructions. Moreover, he did not contest the sufficiency of the evidence in the court of appeals, nor does he do so here.

3. Petitioner's Efforts to Conceal His Involvement.

A year and a half later, in March 1973, Hunt, who had been convicted in the Watergate break-in, threatened to reveal White House responsibility for the Fielding break-in (J.A. 498-501). In response, petitioner removed two memoranda incriminating him from the official files maintained by Young and placed them in his own separate, personal files on the stated ground that they showed "too much forethought" (J.A. 452-57, 465-66). These memoranda subsequently were located in a box of petitioner's files stored at the White House during a search of White House files conducted at the request of the Special Prosecutor's office (J.A. 558-59, 561-64).

In May, when petitioner was not aware that copies of the incriminating documents were available to the prosecutors, he testified before a federal grand jury that prior to the Fielding break-in, he knew nothing about either an attempt to get information for a psychological profile on Ellsberg or any effort to obtain information from Ellsberg's psychiatrist. Only when petitioner later learned from a newspaper account that Young had kept copies of the memoranda removed from the unit's official files, did he change his account, acknowledging that he had known of these matters before the break-in, but claiming that he had forgotten between that time and the time he read the newspaper account.[6] (J.A. 706-32.)

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[6] Petitioner told FBI agents on May 1, 1973, that it had been over a year since he had seen anything on the White House investigation of the Pentagon Papers case, even though he had reviewed the files only five weeks earlier (J.A. 552-57, 704-05).

ARGUMENT

I. THE GOVERNMENT SUSTAINED ITS BURDEN OF PROVING ALL ELEMENTS OF A VIOLATION OF 18 U.S.C. § 241, AND PETITIONER WAS NOT PRECLUDED FROM PROVING ANY RELEVANT DEFENSE

The crux of petitioner's challenge to his conviction for conspiring to violate Dr. Fielding's Fourth Amendment rights is his contention that the district court, through both its restrictions on the admission of evidence and its instructions to the jury, improperly prevented him from establishing that he had a good faith belief that he had the authority lawfully to approve the warrantless entry and search of Dr. Fielding's office in order to obtain foreign intelligence information. He asserts that such a belief, even if contrary to well established law, constitutes a valid defense to prosecution under 18 U.S.C. § 241 because it precludes a finding of specific intent. He makes this argument despite his trial testimony characterizing the entry as illegal and his actual defense, which was grounded solely on the claim that he knew nothing about the entry in advance (J.A. 622, 644-45).

Section 241 makes it a crime for "two or more persons [to] conspire to injure . . . any citizen in the . . . enjoyment of any right . . . secured to him by

the Constitution or laws of the United States." As the court of appeals held, the district judge properly concluded that the specific intent required under this section is merely "the purpose of the conspirators to commit acts which deprive a citizen of interests in fact protected by clearly defined constitutional rights." It is not necessary that the defendant subjectively believe or be aware that he is violating those rights (Pet. App. a23).

The district judge determined that the warrantless entry and search constituted a plain and indisputable violation of the Fourth Amendment. He rejected the claim that members of the White House staff, without the approval of the President or the Attorney General, may order the warrantless search of a home or office in the name of national security. Thus, the district judge necessarily and correctly excluded evidence of alleged "national security" circumstances surrounding the break-in. The district judge's instructions to the jury accurately described the four elements of the offense. He told the jury that the prosecutor must prove beyond a reasonable doubt: (1) that there was a conspiracy (which petitioner knowingly joined); (2) that the purpose of the conspiracy was to carry out a warrantless entry and search of Dr. Fielding's office without his permission; (3) that the conspirators were governmental employees or agents who intended to enter and to search Dr. Fielding's office without warrant or permission for governmental rather than purely personal reasons; and (4) that Dr. Fielding was at the time an American citizen (J.A. 657-58).

A. The Element of Specific Intent Under Section 241

In an ordinary conspiracy the government need only prove that the defendants agreed and specifically intended to do all the acts proscribed by statute. *See, e.g., United States* v. *Feola*, 420 U.S. 671, 696. This Court, however, has added two additional elements to the specific intent requirement in a prosecution under Section 241: first, the constitutional right violated must be well-established and plainly applicable; and second, the defendants must specifically intend and agree to invade for governmental and not private purposes the federal interests protected by the right in question. These elements respond to two concerns —first the need for fair warning because of the danger of vagueness under Section 241 arising from shifting conceptions of constitutional principles and, second, considerations of federalism.

Screws v. *United States*, 325 U.S. 91, 104, the seminal case, held that a civil rights prosecution may be maintained only where the federal right violated has been "made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." *See also, United States* v. *Guest*, 383 U.S. 745, 753, 754 (applying Screws to Section 241). This requirement precludes any claim that Section 241 is unconstitutionally vague because it incorporates rights subject to evolving interpretation. There is no problem of fair warning if the section is limited to constitutional rights that are plainly applicable in the situation confronting the defendant and well-established prior to his actions.

The second requirement—that one object of the conspiracy must be to deprive the citizen-victim of interests protected by a federally defined right—restricts the reach of Section 241 to the limited federal interests in the area. The concern of Congress in enacting Section 241 was to extend the federal police power to those who intentionally interfere with federally protected interests—for example, police officials whose specific intent is to carry out the governmental purpose of searching private premises, or individuals who act with the purpose of preventing other citizens' use of interstate highways. The section was not intended to reach crimes that traditionally are a matter of state concern—for example, individuals who burglarize a doctor's office for personal gain, but also happen to be government agents. Nor does Section 241 apply to robbers who by happenstance rob a person in the course of travel from one state to another, although the robbery in fact interferes with interstate commerce. *See Screws* v. *United States*, *supra*, 325 U.S. at 106; *Anderson* v. *United States*, 417 U.S. 211, 223.

As the court of appeals summarized, "[i]f both requirements are met, even if the defendant did not in fact recognize the unconstitutionality of his act, he will be adjudged as a matter of law to have acted 'willfully'—*i.e.*, 'in reckless disregard of constitutional prohibitions or guarantees'" (Pet. App. a20). There never has been a requirement that the defendant must be thinking in constitutional or legal terms when he commits the acts that constitute the

basis of the violation. This conclusion is not only consistent with, but is mandated by *Screws*. In discussing why the indictment in *United States* v. *Classic*, 313 U.S. 299, charging a civil rights violation arising from the willful alteration of ballots, satisfied *Screws*' delineation of the element of specific intent, the Court said (325 U.S. at 106):

> Such a charge is adequate since he who alters ballots or without legal justification destroys them would be acting willfully in the sense in which [§ 242] uses the term. *The fact that the defendants may not have been thinking in constitutional terms is not material* where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at lease act in reckless disregard of constitutional prohibitions or guarantees. (Emphasis added).

See also, *Williams* v. *United States*, 341 U.S. 97, 101-02; *United States* v. *Guest*, *supra*, 383 U.S. at 753-54, 758; *Anderson* v. *United States*, *supra*, 417 U.S. 211, 226.

Assuming that the warrantless entry and search of Dr. Fielding's office constituted a plain and indisputable violation of the Fourth Amendment, it was thus irrelevant that petitioner may have had a good faith belief that it was not unconstitutional. This is hardly a startling or novel proposition. A mistake of law never has been considered a defense to a criminal violation where the offense is *malum in se*. *See, e.g.*, *United States* v. *International Minerals & Chem-*

ical Corp., 402 U.S. 558, 563; *Dennis* v. *United States*, 171 F.2d 986, 990 (2d Cir. 1948), *aff'd*, 339 U.S. 162; and Pet. App. a23-24. Neither *Screws* nor its progeny vitiate this traditional and salutary principle.[7]

B. The Entry and Search Constituted a Plain and Indisputable Violation of the Fourth Amendment

The district judge ruled as a matter of law that at the time of the entry and search, it was plainly established that concerns of national security did not excuse the failure to obtain a judicial warrant for a physical search, both because any exemption from normal warrant requirements that may exist in the case of electronic surveillance must be invoked personally by the President or Attorney General on a case-by-case basis, and because such an exemption does not cover physical searches even when invoked by one of these officials. Pretermiting the question whether there is any foreign intelligence exception to the warrant requirement for physical entries and searches, the court of appeals held that "in any event the 'national security' exemption can only be invoked if there has been a specific authorization by the President, or by the Attorney General as his chief-legal

[7] Petitioner's reliance on *Pierson* v. *Ray*, 386 U.S. 547, is misplaced. Petitioner cannot claim to have been misled by a statute, court decision or other formal statement of law. As we discuss below, the violation of the Fourth Amendment was clear and well-established; there could have been no reasonable mistake about the illegality of the plan to enter and search Dr. Fielding's office.

advisor, for the particular case" (Pet. App. a29-30). This was clear in 1971, as it is now. As the court of appeals explained (Pet. App. a30):

> No court has ever in any way indicated, nor has any Presidential administration or Attorney General claimed, that any executive officer acting under an inexplicit Presidential mandate may authorize warrantless searches of foreign agents or collaborators, much less the warrantless search of the offices of an American citizen not himself suspected of collaboration.

This is clearly correct. In 1967, four years before petitioner conspired to search Dr. Fielding's office without a warrant, this Court reiterated "one governing principle, justified by history and by current experience," that consistently had been followed in interpreting the Fourth Amendment "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U.S. 523, 528-29.[8] What case law exists strongly

[8] It is beyond dispute that the dark-of-the-night entry and search, which was planned meticulously for weeks in advance, did not fall within any of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Katz* v. *United States*, 389 U.S. 347, 357.

This was not a search incident to a lawful arrest, *Chimel* v. *California*, 395 U.S. 752; nor was it a seizure of evidence in "plain view" of police officers, *Harris* v. *United States*, 390 U.S. 234; finally, this was not a search that falls within the ambit of "hot pursuit" or other "exigent circumstances" that require immediate action in order either to protect the

suggests that the warrant requirement to search a citizen's home or office and seize his confidential papers is fully applicable even in foreign intelligence cases. *See, Abel* v. *United States*, 362 U.S. 217, 226, 236-40; *United States* v. *Coplon*, 185 F.2d 629, 635 (C.A. 2). *See also, United States* v. *United States District Court*, 407 U.S. 297, 313, discussing the historical foundation for the Fourth Amendment, including the cases of John Entick and John Wilkes, which struck down governmental claims of unregulated power to search for evidence of treason and sedition.

Mr. Justice White, concurring separately in *Katz* v. *United States*, *supra*, 389 U.S. at 364, first raised the possibility that a warrant might be dispensed with for electronic surveillance, *but only* if "the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." The same carefully limited possibility that *personal authorization* or the President or Attorney General might substitute for a judicial warrant in a wiretap case relating to "foreign intelligence" was noted by Justice Stewart concurring in *Giordano* v. *United States*, 394 U.S. 310, 314-15. Similarly, in passing the Omnibus Crime Control and Safe Streets Act of 1968,

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safety of law enforcement personnel, or to prevent escape or the destruction of evidence. *See e.g., Warden* v. *Hayden*, 387 U.S. 294; *Schmerber* v. *California*, 384 U.S. 757; *Carroll* v. *United States*, 267 U.S. 132.

Congress avoided deciding whether the President had power to wiretap without a warrant in national security cases, but expressly provided that if any such information were to be received in evidence, it had to be "intercepted by authority of the President." 18 U.S.C. § 2511(3). Far from creating any ambiguity, these precedents, all predating the Fielding break-in, explicitly confirmed that there is no "national security" exception to the warrant requirement where there is no personal approval of the search by the President or Attorney General.[9]

Thus, the court of appeals was certainly correct in concluding that the "law is plain that the simple fact that the President asks a subordinate official to investigate and report on a problem involving national security [all that was asserted as a factual matter by petitioner at trial] does not give the official plenary power to exercise all prerogatives the President might have in that area" (Pet. App. a34.)[10] The court of appeals succinctly and cogently

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[9] The court of appeals summarizes the historical position of the Executive Branch. Presidential memoranda setting forth Executive policies regarding national security electronic surveillance have emphasized the requirement of personal approval by the President or Attorney General. (Pet. App. a32-33.) Also, in its brief (p. 11) in *United States* v. *United States District Court*, *supra*, 407 U.S. 297, the government urged this Court to adopt the principle suggested by Mr. Justice White in *Katz*.

[10] *United States* v. *Barker* (Pet. App. G), to which petitioner repeatedly refers, is not in conflict with the decision of the court of appeals. *Barker* was a 2-1 decision, with no majority opinion, of the same panel of the court below, re-

explained the policy underlying the conclusion (Pet. App. a31):

> The defendant totally misapprehends the critical role played by the President and the Attorney General, when the "national security" exception is invoked. It is argued that this exception gives government officials the power surreptitiously to intrude on the privacy of citizens without the necessity of first justifying their action before an independent and detached member of the judiciary. Unless carefully circumscribed, such a power is easily subject to abuse. The danger of leaving delicate decisions of propriety and probable cause to those actually assigned to ferret out "national security" information is patent, and is indeed illustrated by the intrusion undertaken in this case, without any more specific Presidential direction than that ascribed to Henry II vexed with Becket. *As a constitutional matter, if Presidential approval is to replace judicial approval for foreign intelligence gathering, the personal authorization of the President—of his alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility*

versing the convictions of petitioners co-defendants Barker and Martinez. Unlike petitioner, Barker and Martinez could have believed that Hunt, who had recruited them on behalf of the White House, had proper White House authorization for the operation, including presidential approval.

Similarly, the *discretionary* decision of the Department of Justice not to prosecute former CIA Director Helms hardly establishes that it was reasonable for petitioner to believe "that searches of this nature were within the ambit of his authority" (Petition, p. 26).

> *for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the President's prerogative.* (Emphasis added.)

See United States v. *Giordano*, 416 U.S. 505; *United States* v. *Chavez*, 416 U.S. 562.

Petitioner's contention that the decision below presents an "issue of grave and serious national importance" and a "potential restriction of significant magnitude to this nation's ability to protect its sovereignty" is belied by the historical position of the Executive (see note 9, *supra*) and the position taken by the Department of Justice in its *amicus curiae* memorandum in the court below. The Department said:

> It is the position of the Department of Justice that such activities must be very carefully controlled. There must be solid reason to believe that foreign espionage or intelligence is involved. In addition, the intrusion into any zone of expected privacy must be kept to the minimum and *there must be personal authorization by the President or the Attorney General.* The United States believes that activities so controlled are lawful under the Fourth Amendment.

Moreover, this bizarre and unique case, involving as it does an extra-statutory, *ad hoc* group of government agents rather than a regular intelligence agency, hardly presents an appropriate case for review by this Court.

II. NONE OF THE REMAINING ISSUES WARRANTS REVIEW

A. Pre-Trial Publicity

Petitioner's contention is essentially that the trial judge failed to conduct a "meaningful" voir dire in light of the pre-trial publicity (Petition, p. 27). The court of appeals' careful review of the transcript of the voir dire examination, however, confirms that the trial judge "adequately probed the question of prejudice and enabled the defendants to ascertain—within limits of reasonableness, and necessary adequacy—what the prospective jurors had heard about the case and the extent to which they might have made preliminary determinations about guilt or innocence" (Pet. App. a11-12, n.8). Significantly, counsel were invited by the judge to propose additional questions to venireman, who were questioned individually *in camera* about pre-trial publicity, and petitioner's counsel did not suggest any further inquiry. Indeed, he expressly commended the judge on the manner in which the voir dire was being conducted.

The court of appeals' summary of the results of the voir dire also shows that there was no "pattern of deep and bitter prejudice" and, thus, that the voir dire was sufficient to discover and excuse any venireman who might not have been able to "lay aside [any] impression or opinion and render a verdict based on the evidence presented in court." *Irvin* v. *Dowd*, 366 U.S. 717, 723, 727. *See also*,

Murphy v. *Florida*, 421 U.S. 794; *Beck* v. *Washington*, 369 U.S. 541. As the court said (Pet. App. a11, n.8):

> . . . The voir dire revealed that the array as a group neither was generally aware of the facts of the break-in nor had formed opinions about the defendants. A panel of approximately 120 veniremen was questioned about publicity; all thirteen who indicated they had an unfavorable opinion about the defendants were excused.
>
> As to the jurors selected to serve none had expressed an opinion about the defendants' guilt, although one had heard that there had been a break-in by someone and another heard that Ehrlichman was "involved" (Tr. 394-97). Few of the jurors selected had more than a faint awareness of the Fielding. Ellsberg matter, and none expressed any particular interest in Watergate. None were challenged for cause by the defendants."

B. Discovery

The court of appeals' detailed factual analysis of petitioner's claims that he was denied discovery rights fully disposes of those claims (Pet. App. a40-45). The short answer is that petitioner, who had full access to all his files at the White House, was provided copies of all documents that he specifically identified that were material to his defense. His contention that he was deprived of the opportunity to demonstrate that he was denied specific evidence was found to be "groundless" by the court of appeals

after a careful review of the transcript (Pet. App. a40-41, n.96). Moreover, the trial judge repeatedly emphasized that he would enforce subpoenas for specific items shown to be relevant and admissible, including documents in the so-called "Leaks" file.[11] *See generally, United States* v. *Nixon*, 418 U.S. 683, 697-700; *Bowman Dairy Co.* v. *United States*, 341 U.S. 214.

With respect to petitioner's claim that he was deprived of the right to the assistance of counsel in examining certain privileged White House papers, the court of appeals concluded that petitioner could himself review all privileged documents and could consult freely with counsel about any documents and that there was no showing that his counsel was impeded in securing sufficient information to frame necessary subpoenas *duces tecum*. Counsel's presence at defendant's side is not required at any stage where there is but a "minimal risk that [his] counsel's absence . . . might derogate from his right to a fair trial." *United States* v. *Wade*, 388 U.S. 218, 228. *See also, United States* v. *Ash*, 413 U.S. 300, 313-15.

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[11] Contrary to petitioner's suggestion (Petition, p. 29), the government never contended, nor did Young testify, that petitioner had destroyed documents subsequently found in the "Leaks" file. The government's contention was simply that certain incriminating documents had been removed from Young's files by petitioner and even later found in a file of petitioner's papers labeled "Leaks". It was undisputed that the documents were found in that file. Production of the file itself or the rest of its irrelevant, but classified documents was plainly not pertinent to any disputed issue.

C. Severance

Petitioner does not contend that the court of appeals applied an erroneous standard in affirming the district court's refusal to sever him. Nor could he. The court of appeals followed a well-established and uniform line of authority that severance is required only where the conflict of defenses is so prejudicial that the differences are irreconcilable. Rather, petitioner challenges the court's factual determination that the record did not reflect any irreconcilable conflict. This conclusion hardly warrants review by this Court, particularly in light of the analysis of the court below which conclusively demonstrates that there is no basis for a finding that the district judge abused his discretion. *See, e.g., Opper* v. *United States*, 348 U.S. 84, 95.

Moreover, there is no conflict between the decision below and *De Luna* v. *United States*, 308 F.2d 140 (C.A. 5). *De Luna* did not hold that severance is required whenever one defendant may wish to comment on another's refusal to testify. In *De Luna*, two defendants tried jointly each maintained the other was solely responsible, and the importance of one defendant's comment on the silence of the other was overriding. Here, there was no such inconsistency of defenses, a distinction which precludes application of the *De Luna* rule. *See United States* v. *Hines*, 455 F.2d 1317, 1334 (C.A.D.C.), *certiorari denied*, 406 U.S. 975; *United States* v. *Roselli*, 432 F.2d 879, 902 (C.A. 9), *certiorari denied*, 401 U.S. 924.

D. Interrogatories to the President

The court of appeals properly held that, if a subpoena *duces tecum* addressed to a President only may be enforced where there is a "demonstrated, specific need" for the evidence or where the evidence is "essential to the justice of the [pending criminal] case," *see United States* v. *Nixon*, 418 U.S. 683, 713, a more burdensome subpoena *ad testificandum* can be justified only where there is at least as compelling a showing (Pet. App. a45). *See United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C. Va.). There was and could be no such showing where petitioner did not assert that the President had personally approved or directed the entry and search.

Petitioner's claim that he was prejudiced by the district judge's refusal to propound his interrogatories, instead of those prepared by the judge, is fully answered by the court of appeals (Pet. App. a46):

> [A]s to the detailed interrogatories submitted by Ehrlichman, we find, as did the District Court, that many of the questions were repetitive or irrelevant to the issues properly before the court. The court drafted concise questions addressed to the central issues of the Ehrlichman submission and the President answered these. Ehrlichman contends, however, that the court's interrogatories were inadequate to explore the issue whether concealment of the activities of the "Room 16" unit was undertaken pursuant to Presidential order, to protect highly classified information, or whether such concealment was intended instead to mask wrongdoing. Our comparison of the interrogatories submitted by the defendant and those formulated by the court on this issue lead us to reject this contention. It appears highly unlikely that the President's answers would have differed in any significant respect had Ehrlichman's submission been adopted. Moreover, the President's response to the court's interrogatories revealed that he would have had little useful testimony to give on the question of concealment—even assuming the relevance of that question to the issues at trial—if he had been called to testify in person.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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November 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 224219 21